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Federal Communications Commission
Office of the Secretary

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March 5, 2007

VIA HAND DELIVERY

REDACTED - FOR PUBLIC INSPECTION

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 06-172: In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas

Dear Ms. Dortch:

Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, through counsel, hereby submit for filing with the Commission their initial Comments on the above-referenced Petitions of the Verizon Telephone Companies. Please note, the attached submission is redacted for public inspection, in accordance with the Second Protective Order in this proceeding. A **HIGHLY CONFIDENTIAL** version of the initial Comments also has been submitted to the Commission Secretary, and to Mr. Gary Remondino of the Wireline Competition Bureau, under separate cover.

Please feel free to contact the undersigned counsel at (202) 342-8625 if you have any questions, or require further information.

Respectfully submitted,



Brett Heather Freedson

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MAR - 5 2007

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

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| In the Matter of |) | |
| |) | |
| Petitions of the Verizon Telephone Companies |) | |
| for Forbearance Pursuant to 47 U.S.C. § 160(c) |) | WC Docket No. 06-172 |
| in the Boston, New York, Philadelphia, |) | |
| Pittsburgh, Providence, and Virginia Beach |) | |
| Metropolitan Statistical Areas |) | |

**COMMENTS OF BROADVIEW NETWORKS, INC., COVAD COMMUNICATIONS
GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC**

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March 5, 2007

TABLE OF CONTENTS

| | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| I. INTRODUCTION..... | 2 |
| II. THE STANDARD FOR ANALYSIS OF SECTION 10 FORBEARANCE REQUESTS IS WELL-ESTABLISHED..... | 5 |
| III. VERIZON'S PETITIONS SHOULD BE DISMISSED DUE TO VERIZON'S MISUSE OF CONFIDENTIAL INFORMATION AND THE GROSS INADEQUACIES OF SUPPORTING DATA | 8 |
| A. Interested Parties Have Been Denied The Right To Participate Fully In This Proceeding..... | 9 |
| 1. Interested parties have been precluded from using the complete Omaha Forbearance Order to respond to Verizon's claims | 9 |
| B. Verizon has Unlawfully Disclosed Carrier Proprietary Information | 10 |
| C. The Evidence Produced by Verizon Does Not Meet Its Burden of Proof | 14 |
| IV. VERIZON'S PETITIONS SHOULD BE DENIED ON THE MERITS BECAUSE VERIZON HAS NOT ESTABLISHED THAT SUFFICIENT COMPETITION EXISTS WITHIN EACH RELEVANT MARKET TO WARRANT FORBEARANCE FROM STATUTORY UNBUNDLING REQUIREMENTS..... | 19 |
| A. Verizon's Analysis Inappropriately Ignores the Relevant Geographic Markets..... | 21 |
| B. Verizon Fails to Show Sufficient Facilities-Based Competition Exists In Any Relevant Product Market For Any Wire Center..... | 22 |
| 1. Cable Competition..... | 27 |
| 2. Competition from Wireless Services..... | 37 |
| 3. Competition from Over-the-Top VoIP Providers | 42 |
| 4. Alternative Transport Facilities..... | 44 |
| 5. Competitive Wholesale Service Offerings | 49 |
| V. VERIZON HAS NOT SHOWN IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS..... | 59 |
| VI. SECTION 271 IS NOT A SUFFICIENT BACKSTOP TO DEVELOP AND PRESERVE COMPETITION IF FORBEARANCE IS GRANTED | 61 |
| VII. A GRANT OF FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST | 67 |
| A. Competition Would Be Diminished If Forbearance Is Granted..... | 68 |
| B. Consumers Would Be Harmed If Forbearance Is Granted | 73 |
| VIII. CONCLUSION | 76 |

SUMMARY

The 1996 Act allows the Commission to forbear from applying certain provisions of the 1996 Act, or certain of its rules and regulations, only if the Commission affirmatively finds that each of the requirements established by Congress is satisfied, for each of the markets within which forbearance is requested. Under section 10, a grant of forbearance relief is lawful if the Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that that charges, practices, classification or regulations... are just, reasonable, and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.

Importantly, the Commission's public interest analysis also must address whether a grant of forbearance will promote competitive market conditions, or otherwise will enhance competition among providers of telecommunications services. The 1996 Act places the full burden of proving that forbearance relief is warranted on the petitioning party, and does not obligate the Commission to consider evidence not pled by the petitioner.

The Verizon Petitions do not support a grant of forbearance by the Commission, and should be summarily dismissed. The legal arguments made by Verizon inappropriately rely on the market-specific framework set forth in the Commission's confidential *Omaha Forbearance Order*, and effectively deny interested parties a meaningful opportunity to evaluate whether the Verizon Petitions, in fact, justify a finding that ongoing unbundling and dominant carrier regulations are not necessary to ensure that Verizon's charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers. Furthermore, the supporting "data" presented in the Verizon Petitions includes E911 listings disclosed to the

Commission by Verizon in violation of federal and state laws. Moreover, this data does not accurately reflect the nature and scope of competition within the wire centers for which forbearance is requested by Verizon. Similarly, other evidence proffered by Verizon, including marketing statements by would-be service providers, is not sufficiently detailed to demonstrate the existence, on a wire center-specific basis, of actual facilities-based competition within each of the six MSAs that are the subject of the Verizon Petitions.

In addition to the facial shortcomings of the Verizon Petitions, each of the forbearance claims raised by Verizon fail on the merits. A grant of forbearance by the Commission is lawful only if the Verizon Petitions demonstrate that substantial actual facilities-based competition exists for each relevant product market, and within each relevant geographic market. Contrary to Commission precedent, the Verizon Petitions rely only on MSA-wide, statewide, and nationwide information; Verizon does not proffer any of the wire center-specific data necessary to support its forbearance claims. Moreover, the Verizon Petitions improperly rely on general statistical information, including line loss and market coverage figures, without providing any data regarding the actual market presence of competing telecommunications service providers.

With regard to Verizon's requests for relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements under Section 214 of the Act and Part 63 of the Commission's rules, and the Commission's *Computer III* requirements, including CEI and ONA requirements, the Verizon Petitions lack *any* analysis of the statutory requirements of section 10. Significantly, the Verizon Petitions do not address whether Verizon maintains market power within the wire centers subject to its forbearance requests, nor do the Petitions discuss supply and demand elasticities, or Verizon's costs, resources, structure and size within

those markets. Absent any such analysis, a grant of forbearance by the Commission for those non-section 251 dominant carrier obligations is not justified.

The Commission must consider whether a grant of forbearance would leave providers of competing telecommunications services without meaningful wholesale alternatives, including the network facilities and services that Verizon must offer pursuant to section 271 of the 1996 Act. Verizon has sought to evade its section 271 obligations through repeated challenges to state commission oversight, including requirements for the tariffing of section 271 network elements and services. Moreover, Verizon fails to negotiate in good faith commercial contracts that govern the rates, terms and conditions of its section 271 offerings. At bottom, Verizon has not shown that its treatment of its obligations under section 271 would provide a sufficient backstop to protect consumers and competition if section 251(c)(3) unbundling were to be granted by the Commission.

It is also clear that the Verizon Petitions are not consistent with the public interest, and therefore do not satisfy the third prong of the section 10(a) test. Verizon offers no evidence that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout the six MSAs. Indeed, the evidence is compelling that competitive conditions in these MSAs are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition. In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial

competitive *benefits* would arise from forbearance. Verizon has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| Metropolitan Statistical Areas |) | |

**COMMENTS OF BROADVIEW NETWORKS, INC., COVAD COMMUNICATIONS
GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC**

Broadview Networks, Inc., Covad Communications Group, NuVox
Communications and XO Communications, LLC (hereinafter referred to jointly as
“Commenters”), through counsel and pursuant to the Public Notice issued by the Federal
Communications Commission (“FCC” or “Commission”) on January 26, 2007,¹ hereby provide
their comments on the petitions filed by Verizon on September 6, 2006 seeking forbearance from
certain of the Commission’s rules within six Metropolitan Statistical Areas (“MSAs”). Verizon
seeks substantial deregulation, pursuant to section 10 of the Communications Act of 1934, as
amended (“Act”),² within the Boston, New York, Philadelphia, Pittsburgh, Providence, and
Virginia Beach MSAs.³

¹ *Wireline Competition Bureau Grants Extension of Time to File Comments on Verizon’s
Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh,
Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172,
Public Notice, DA 07-277 (rel. Jan. 26, 2007).

² 47 U.S.C. § 160.

³ The Verizon Petitions request that the Commission forbear from applying to Verizon,
within those markets: (1) loop and transport unbundling obligations, under 47 U.S.C. §
251(c) (51 C.F.R. §§ 51.319(a), (b) and (e)); (2) Part 61 dominant carrier tariff
requirements (51 C.F.R. §§ 61.32, 61.33, 61.58 and 61.59); (3) Part 61 price cap
regulations (51 C.F.R. §§ 61.41-61.49); (4) Computer III requirements, including CEI

...Continued

The Commission should summarily dismiss the Verizon Petitions because: (1) carriers' confidential information was unlawfully disclosed to the Commission in the Petitions; (2) Verizon inappropriately relies on the framework employed in the *Omaha Forbearance Order*⁴ and parties have been denied the right to use the complete unredacted *Omaha Forbearance Order* to analyze and respond to Verizon's claims; and (3) the "evidence" submitted by Verizon to support its requests is not sufficiently detailed and market-specific to meet its burden of proof. Even if the Commission declines to dismiss the Petitions, which it should not, it ultimately must deny Verizon the forbearance it seeks on the merits because Verizon clearly has not met the statutory prerequisites for forbearance contained in section 10 of the Act.

I. INTRODUCTION

Verizon's Petitions define a new standard for brazen advocacy. Verizon suggests that the Commission need only follow the lead set in its Omaha and Anchorage forbearance proceedings to conclude that forbearance from unbundling and dominant carrier regulations is appropriate for the entire Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs. According to Verizon, the New York MSA – the largest MSA in the United

and ONA requirements; and (4) dominant carrier requirements, arising under Section 214 of the Act and Part 63 of the Commission's rules, addressing the processes for acquiring lines, discontinuing services, assigning or transferring control and acquiring affiliation (51 C.F.R. §§ 63.03, 63.04, and 63.60-63.66).

⁴ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *appeal pending Qwest Corporation v. Federal Communications Commission*, Case No. 05-1450 (D.C. Cir.).

States – and the Philadelphia MSA – the fourth largest MSA in the nation – are “just like” Omaha, Nebraska and Anchorage, Alaska.⁵

Verizon’s position is patently absurd. Indeed, Verizon should know better, having been sent a clear signal by the Commission in its Omaha and Anchorage forbearance orders that the Omaha and Anchorage markets presented unique circumstances and that the conclusions reached in those proceedings were not intended to set a precedent for the disposition of future forbearance requests.⁶ As explained in detail below, Verizon’s Petitions are entirely unmoored from the competition and public interest analysis that is the foundation for any review of whether forbearance is justified under section 10. In addition, Verizon’s Petitions constitute a blatant attempt to evade the voluntary commitments it made in order to gain approval to merge with MCI as well as a frontal attack on the Commission’s recent decision regarding the proper application of the unbundled network element (“UNE”) requirements in section 251(c)(3) of the Act.

A little more than a year ago, Verizon agreed, in return for Commission approval of its application to merge with MCI, not to seek increases in any rates for UNEs for a period of two years from the merger closing date.⁷ Apparently, in Verizon’s view, its commitment not to raise rates for certain services for a certain period of time does not also commit it to refrain from

⁵ The Omaha MSA is the 60th largest MSA in the nation and the Anchorage MSA ranks 138th among the nation’s MSAs.

⁶ See, e.g., *Omaha Forbearance Order*, ¶ 14; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, WC Docket No. 05-281, ¶ 1 (rel. Jan. 30, 2007) (“*Anchorage Forbearance Order*”).

⁷ See *Verizon Communications Inc. and MCI Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, App. G, Unbundled Network Elements, ¶ 1 (2005) (“*Verizon-MCI Merger Order*”).

attempting to eliminate its obligation to offer those services at all. Not surprisingly, the Commission closed this alleged merger condition loophole in the more-recent AT&T-BellSouth merger proceeding.⁸ Notwithstanding the fact that the express terms of the Verizon-MCI merger conditions do not preclude Verizon from filing petitions seeking forbearance from its UNE obligations during the term of its merger commitments, Verizon's attempt to evade its commitment not to raise UNE rates by obtaining forbearance should not be countenanced by the Commission.

Further, the Commission should reject Verizon's attempt to undo the loop and transport UNE rules adopted by the Commission in its *Triennial Review Remand* proceeding.⁹ The Commission's *Triennial Review Remand* UNE rules, which were the product of a comprehensive proceeding with an extensive record, were upheld by the D.C. Circuit less than one year ago. The D.C. Circuit's affirmation of the Commission's UNE rules represented the first time since adoption of the provision in 1996 that the requirements of section 251(c)(3) were not awaiting appellate action or otherwise under attack. Instead of respecting the Commission's interpretation of section 251(c)(3)'s unbundling requirements and the D.C. Circuit's blessing of the Commission's action, Verizon has mounted a campaign to completely undo those requirements throughout six major markets affecting millions of consumers. The Commission should summarily reject this ploy.

⁸ See Attachment to Letter from Robert W. Quinn, Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, attached to *FCC Approves Merger of AT&T Inc. and BellSouth Corporation*, FCC Public Notice, Dec. 29, 2006, at 2-3, 10.

⁹ See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* WC Docket Nos. 04-313, 01-338, Order on Remand, FCC 04-290, 20 FCC Rcd 2533 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*"), affirmed *Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

There is a fundamental flaw in the reasoning at the center of Verizon's Petitions. Verizon points to the existence of competition using UNEs as justification for eliminating competitors' access to those same UNEs. Verizon would have the Commission believe that Congress intended to require the unbundling of certain core ILEC facilities and services (*i.e.*, loops and transport circuits) so that competitors could make investments in network facilities and services used in concert with those UNEs but when competitors actually succeeded in competing with Verizon through use of those UNEs, those UNEs could be eliminated. Certainly, that is not what Congress intended. Indeed, the Commission itself has recognized this, holding in the *Anchorage Forbearance Order* that forbearing from section 251(c)(3) where no competitive carrier has constructed substantial competing last-mile facilities is not consistent with the public interest and likely would lead to a substantial reduction in retail competition.¹⁰

For all of the reasons outlined in this Section, as well as each of the reasons explained below, Verizon's forbearance requests should be rejected.

II. THE STANDARD FOR ANALYSIS OF SECTION 10 FORBEARANCE REQUESTS IS WELL-ESTABLISHED

Section 10(a) of the Act allows the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications

¹⁰ *Anchorage Forbearance Order*, ¶ 23. See also *Omaha Forbearance Order*, ¶ 64. While it is true that retail competition is a goal of the 1996 Act, it is not the only goal, and a standard that focuses exclusively on retail competition would do so at the expense of Congress's other goals, such as investment in new facilities. Moreover, the relationship between retail competition and unbundling is complex. In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs. Thus, a standard that eliminates UNEs when a retail competition threshold has been met could be circular. See, *e.g.*, *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order on Remand, 18 FCC Rcd 16978 ¶ 141 (2003) ("*Triennial Review Order*" or "*TRO*").

service, or class of telecommunications carriers or telecommunications services, if the

Commission determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.¹¹

The D.C. Circuit and the Commission have made it clear that all three prongs of the forbearance standard must be met for forbearance to be permissible.¹² The three prongs are conjunctive and the Commission must deny any petition which fails to satisfy any single prong.¹³ In making its determinations, the Commission must consider “whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.”¹⁴

Further, the burden of proof in a forbearance proceeding rests squarely on the party petitioning for relief.¹⁵ The petitioning party must “provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards.”¹⁶

Anecdotes cannot sustain a petitioning party’s burden of demonstrating that the regulations or

¹¹ 47 U.S.C. § 160(a).

¹² See *Petition for Forbearance From E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (2003) (“*E911 Forbearance Order*”); see also *Cellular Telecommunications & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

¹³ *E911 Forbearance Order*, 18 FCC Rcd at 24653.

¹⁴ 47 U.S.C. § 160(b).

¹⁵ *E911 Forbearance Order*, 18 FCC Rcd at 24658.

¹⁶ *Id.*

provisions in question are unnecessary and forbearance is consistent with the public interest.¹⁷ Instead, a petitioning party must provide detailed, market-specific evidence. Moreover, as the Commission emphasized in the *Omaha Forbearance Order*, it is under no statutory obligation to evaluate a forbearance petition “otherwise than as pled.”¹⁸ While general unsupported claims are never sufficient to support forbearance, unsubstantiated claims are especially lacking in situations – like the present case – where the Commission has already found (and been upheld by the courts) that telecommunications carriers are impaired without access to the unbundled loops and dedicated transport from which the petitioning party seeks forbearance.

The Commission has stated repeatedly that each forbearance request “must be judged on its own merits”¹⁹ and that its forbearance determinations do not result in rules of general applicability.²⁰ Indeed, the Commission has professed its understanding that forbearance proceedings are not the appropriate context in which to craft any new regulatory tests of general applicability. In the *Omaha Forbearance Order*, for instance, the Commission expressly stated:

We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.²¹

Despite such clear statements, Verizon urges the Commission to grant it forbearance on the basis of the “precedent” established in previous forbearance orders. Verizon presents its petitions as requests for “substantially the same regulatory relief the Commission

¹⁷ *Id.*

¹⁸ *Omaha Forbearance Order*, n. 161.

¹⁹ *Id.*, ¶ 2.

²⁰ *Id.* See also *Anchorage Forbearance Order*, ¶ 11.

²¹ *Omaha Forbearance Order*, ¶ 14. See also *Anchorage Forbearance Order*, ¶ 11.

granted in the *Omaha Forbearance Order*.”²² Indeed, they are filled with citations to the *Omaha Forbearance Order* – there are more than three dozen references to the *Omaha Forbearance Order* in each Verizon Petition – as support for the relief it seeks. Verizon’s bootstrapping effort directly contradicts Commission policy and is particularly egregious given the major markets involved and the substantially differing competitive conditions in those markets.

III. VERIZON’S PETITIONS SHOULD BE DISMISSED DUE TO VERIZON’S MISUSE OF CONFIDENTIAL INFORMATION AND THE GROSS INADEQUACIES OF SUPPORTING DATA

Dismissal of Verizon’s Petitions outright, as opposed to denying them in due course, is the appropriate course of action because: (1) Verizon inappropriately relies on the framework utilized in the *Omaha Forbearance Order* and interested parties have been denied the right to use the unredacted *Omaha Forbearance Order* to analyze and respond to Verizon’s claims; (2) the data submitted by Verizon was unlawfully disclosed to the Commission; and (3) the “evidence” submitted by Verizon to support its requests is not sufficiently detailed and market-specific to meet its burden of proof.

²² Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area (filed Sept. 6, 2006), at 1, WC Docket No. 06-172 (consolidated) (the “Verizon Petitions” or “Petitions”).

A. Interested Parties Have Been Denied The Right To Participate Fully In This Proceeding

1. Interested parties have been precluded from using the complete *Omaha Forbearance Order* to respond to Verizon's claims.

As explained above, each forbearance request must be treated on its own merits and must rise or fall based on the particular market circumstances that exist at the time of filing. It is never sufficient for a requesting party to represent that its request should be granted because it is virtually identical to a successful forbearance request made previously by another telecommunications carrier for another market.²³ Yet, that in effect is what Verizon has presented to the Commission. Verizon seeks "substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*"²⁴ on the ground that competition in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs meets, if not exceeds, the levels found by the Commission in portions of the Omaha MSA when it granted Qwest forbearance in that MSA.²⁵

Verizon's attempt to piggy-back regulatory relief on the unique circumstances found to exist in the Omaha MSA is particularly inappropriate because interested parties have been precluded from using the confidential data relied upon in the *Omaha Forbearance Order* to analyze and respond to Verizon's claims.²⁶ This treatment of the *Omaha Forbearance Order*

²³ See *Omaha Forbearance Order*, ¶ 14; *Anchorage Forbearance Order*, ¶ n. 28.

²⁴ See, e.g., Verizon Petition – Boston, at 1.

²⁵ See, e.g., *id.* at 2 ("In fact, competition in the Boston MSA is more advanced than it was in Omaha.").

²⁶ Confidential information supporting the Commission's determinations in the *Omaha Forbearance Order* was redacted from the *Order*, and therefore is not available for public inspection and use. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Protective Order, DA 04-1870, 19 FCC Rcd 11377 (2004) ("*Omaha Protective Order*"), at ¶ 7.

significantly impairs the ability of the Commenters and other interested parties to participate fully in the instant proceeding.²⁷ Recognizing this problem, the Commenters sought an amendment to the *Omaha Protective Order* that would permit the use of confidential information by authorized parties for purposes of analyzing and responding to the Verizon Petitions.²⁸ To date, the Commission has failed to rule on this motion. In the absence of an order by the Commission permitting limited use of the unredacted *Omaha Forbearance Order* in this proceeding, and in light of the fact that Verizon relies heavily on the “standard” employed by the Commission in that order, the Commission must dismiss Verizon’s Petitions.

B. Verizon has Unlawfully Disclosed Carrier Proprietary Information

Every local exchange carrier (“LEC”) is required by the Commission’s rules to be able to deliver 911 calls to the appropriate Public Safety Answering Point (“PSAP”).²⁹ Where E911 capabilities exist, LECs must also deliver callers’ names and addresses to the PSAP. To fulfill this obligation, LECs must provide the name, address, and telephone number of each customer to the operator of the E911 database. In five of the six MSAs for which Verizon is seeking forbearance, the PSAP operator is Verizon itself.³⁰ Consequently, in those five MSAs, Verizon’s competitors have entrusted it, pursuant to confidential treatment, with sensitive proprietary data, *i.e.*, their customers’ names and contact information.

²⁷ Specifically, parties are unable to respond substantively to Verizon’s attempt to employ the market coverage definitions and competition benchmarks utilized by the Commission in the *Omaha Forbearance Order*.

²⁸ Motion to Modify Protective Order, WC Docket No. 04-223 (filed Oct. 11, 2006).

²⁹ See 47 C.F.R. §§ 64.3001-64.3002.

³⁰ Verizon was replaced as the PSAP operator in Virginia Beach in March 2005.

Verizon relies, to a significant extent, on information culled from the E911 databases to support all six of its petitions.³¹ Verizon analyzed those databases to determine where its competitors are providing service and which consumers have chosen to use a competitor instead of Verizon and used that information as its “proof” that there is sufficient local competition in the enterprise market to justify forbearance.³²

Verizon is misusing data it obtained exclusively by virtue of its position as the E911 database operator. As identified in the Motion to Dismiss filed by a group of fifteen competitive LECs, “Verizon’s use of E911 data for regulatory advocacy is barred by express terms of its interconnection agreements with CLECs.”³³ Verizon’s interconnection agreements do not authorize any use of confidential information for the purpose of seeking forbearance, or for any regulatory purpose other than enforcement of the interconnection agreement. Further, as noted in the Motion to Dismiss, “Verizon appears to have misappropriated and misused other confidential information in support of its pleading: Verizon relies upon information that it gained under protective order in the Verizon/MCI merger proceeding.”³⁴ Verizon confirms that during the course of the Verizon-MCI merger proceeding it received confidential data that showed competitive local exchange carrier (“CLEC”) fiber deployment. Use of this confidential

³¹ Notwithstanding the fact that after March 2005 it no longer was the E911 PSAP operator in Virginia Beach, Verizon includes data gleaned from the Virginia Beach database in support of its request for forbearance in that MSA. *See* Verizon Petition for Virginia Beach, at 22 (“Based on the most recent E911 listings data available for the City of Virginia Beach and as of December 2005 for other parts of the MSA, competing carriers were using their own switches to serve business lines in [Begin Proprietary] [End Proprietary] percent of the wire centers in the Virginia Beach MSA . . .”).

³² *See, e.g., Lew/Verses/Garzillo Decl. – Boston MSA*, at 24 (“Based on Verizon’s business E911 listings data as of the end of December 2005, competing carriers are serving business customers in **** of the wire centers in the Boston MSA, and these wire centers account for **** percent of Verizon’s retail switched business lines in the MSA.”).

³³ Motion to Dismiss, WC Docket No. 06-172 (filed Oct. 16, 2006), at 3.

³⁴ *Id.*, at 5, quoting paragraph 11 of the *Lew/Verses/Garzillo Decl.-Boston MSA*.

information in the instant forbearance proceedings is not permitted under the terms of the *Verizon-MCI Protective Order* however.³⁵

In addition, Verizon's use of proprietary E911 database information violates state law in New Hampshire³⁶ and Rhode Island. New Hampshire law prohibits Verizon, the entity administering the E911 database in New Hampshire, from using the E911 database for any purpose other than for support of the state's E911 emergency services.³⁷ Likewise, Rhode Island law prohibits the dissemination of telephone subscriber name, address, and telephone number information contained in the E911 database except for the purpose of handling emergency calls or providing notice of imminent threats to public safety.³⁸

Importantly, even if the E911 database information relied upon by Verizon had been lawfully obtained, the Commission should reject its use in this proceeding since E911 listings do not accurately show carriers' actual customers in an MSA. As noted in the accompanying Declaration of Joseph Gillan,³⁹ because E911 listings are relied upon by providers

³⁵ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Order Adopting Protective Order, WC Docket No. 05-75, DA 05-647 (rel. Mar. 10, 2005), at 3 ("Persons obtaining access to Confidential Information . . . under this Protective Order shall use the information solely for the preparation and conduct of this license transfer proceeding . . . and, except as provided herein, shall not use such documents or information for any other purpose . . . or in other administrative, regulatory or judicial proceedings.").

³⁶ New Hampshire state law is relevant to the analysis of Verizon's forbearance request for the Boston MSA, as a portion of the Boston MSA is located within the state of New Hampshire.

³⁷ RSA 106-H:9 states in pertinent part: "Neither the department, nor any vendor or any of its employees to whom such information becomes available in the performance of any contractual services for the department shall disclose any information obtained from the department's records, files or returns or from any examination, investigation, or hearing, nor may any such employee or person be required to produce any such information for the inspection of any person or for the use in any action or proceeding except as provided in this paragraph." NH RSA 106-H:9, III.

³⁸ R.I. Gen Laws § 39-21.1-4.

³⁹ *Declaration of Joseph Gillan* ("Gillan Declaration"), attached hereto as Exhibit 1.

of emergency services, there is a presumption that the E911 database can reliably be used as a measure of local competition.⁴⁰ That presumption is false. Although considerable effort is undertaken to “ensure that the E911 database correctly dispatches emergency personnel to the correct physical address, that care does not mean that the database correctly measures lines for the purpose of competitive analysis.”⁴¹

Recent attempts by incumbents in various state proceedings to use E911 database information to quantify local competition have tested the use of E911 database information as a proxy for actual CLEC line counts. These validation efforts have “demonstrated, without exception, that the E911 database systematically overstates the number of lines served by competitors and, as such, [] is not a reliable measure of local competition.”⁴² In New York, for example, Verizon recently requested reduced regulation of its retail business services, in part, on an E911-based estimate of business lines services by CLECs in the state. An analysis of E911 data showed, however, that Verizon’s E911-based claim significantly exceeded the total number of business lines reported to the FCC *for the entire state*.⁴³ In Oklahoma, it was found that E911 database information inflated CLEC lines in the business market between 70% and 115%⁴⁴ and, in Kansas, the E911 database inflated the number of business lines actually served by Cox by 222%.⁴⁵

Here, Verizon has offered E911-based information purporting to show XO Communications, LLC’s (“XO”) level of operations within the Boston, New York, Philadelphia,

⁴⁰ *Gillan Declaration*, at 3.

⁴¹ *Id.*, at n. 3.

⁴² *Id.*, at 4.

⁴³ *Id.*, at 7.

⁴⁴ *Id.*, at 5.

⁴⁵ *Id.*, at 6.

and Pittsburgh MSAs. A review of this data reveals that the business line counts attributed to XO significantly exceed the actual business line counts recorded by XO's internal ALI database.⁴⁶ For the New York MSA, Verizon's business line counts for XO are overstated by 43%; for the Boston MSA, Verizon's business line counts overstate XO's business lines by 14%; and for the Philadelphia and Pittsburgh MSAs combined, Verizon's data overstates XO's business lines by 22%.⁴⁷

In light of the above discussion, the only way to resolve Verizon's forbearance requests fairly is to strike all references to misappropriated and inaccurate E911 data contained in the Petitions and accompanying documentation. Since Verizon surely cannot carry its burden of proof absent this data, the Commission's only reasonable alternative is to dismiss the Petitions and require Verizon to make its case on a new record free from misappropriated and inaccurate information.

C. The Evidence Produced by Verizon Does Not Meet Its Burden of Proof

As noted above, the party requesting forbearance has the burden of proof to show that the regulations or provisions in questions are unnecessary and forbearance is consistent with the public interest. To meet this burden, the petitioner must produce detailed, market-specific evidence for the particular product and geographic markets for which regulatory relief is sought. Verizon has failed miserably to meet its burden. The data contained in Verizon's Petitions and accompanying materials suffers from two principal defects in this regard.

First, the data provided by Verizon in support of its Petitions is largely anecdotal. Verizon urges the Commission to grant forbearance on the basis of promotional materials,

⁴⁶ See *Declaration of Lisa R. Youngers* ("Youngers Declaration"), attached hereto as Exhibit 2, at 2.

⁴⁷ *Id.*, at 3-4.

marketing statements, and broad generalizations concerning the state of competition in the particular MSAs at issue. Reliance on this type of information to justify forbearance, coupled with an ill-founded reliance on Verizon's competitive predictions concerning the future competitive landscape, would result in a disposition of these petitions that is twice removed from reality.

For example, to support its position that there is sufficient competition by cable providers to justify regulatory relief in the mass market throughout the Boston, New York, Philadelphia, Pittsburgh, and Providence MSAs, Verizon relies predominantly on self-promotional statements by Comcast, such as the following: "The next several years will provide tremendous growth opportunities for Comcast . . . By the end of this year we will be marketing our 'Triple Play' package of video, voice and data services to the majority of our customers."⁴⁸ Similarly, in support of its position that there is sufficient competition by cable providers in the mass market throughout the Virginia Beach MSA, Verizon merely cites Cox's claims that its telephone penetration is "the highest among all cable operators."⁴⁹ Statements made by

⁴⁸ *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Boston Metropolitan Statistical Area (Lew/Verses/Garzillo Decl. – Boston MSA)*", at 9-10; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the New York Metropolitan Statistical Area (Lew/Verses/Garzillo Decl. – New York MSA)*", at 12; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Philadelphia Metropolitan Statistical Area (Lew/Verses/Garzillo Decl. – Philadelphia MSA)*", at 9-10; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Pittsburgh Metropolitan Statistical Area (Lew/Verses/Garzillo Decl. – Pittsburgh MSA)*", at 9; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Providence Metropolitan Statistical Area (Lew/Verses/Garzillo Decl. – Providence MSA)*", at 10-11.

⁴⁹ *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Virginia Beach Metropolitan Statistical Area (Lew/Verses/Garzillo Decl. – Virginia Beach MSA)*", at 9.

Comcast, Cox, and other cable executives at investor conferences⁵⁰ and in press releases⁵¹ round out the picture Verizon sketches of the state of competition by cable-based providers in the six MSAs at issue. Company press releases, investor relations materials, and media reports are not the type of evidence upon which the Commission can base its forbearance determinations however. Verizon's Petitions are completely devoid of the hard data regarding the competitive environment that must be provided by any carrier realistically hoping to gain regulatory relief through the forbearance process. For this reason, Verizon's Petitions should be denied.

The second critical defect in the "proof" submitted by Verizon is that the very limited data regarding the state of competition Verizon has actually produced is not specific enough. This shortcoming renders the data essentially useless to the Commission's forbearance analysis and shows that Verizon has not made the required *prima facie* showing. For example, Verizon has conveniently failed to acknowledge the well-established principle that wire centers are the relevant geographic market for determining the level of competition in a section 251(c)(3) forbearance analysis.⁵² Verizon claims that the appropriate geographic market is the entire MSA⁵³ and the limited empirical data it has submitted in support of its Petitions is presented on

⁵⁰ See, e.g., *Lew/Verses/Garzillo Decl. – Boston MSA*, at 9 ("According to its Chairman, Comcast plans to market its voice services to 80 percent of its footprint by the end of 2006."). See also *Lew/Verses/Garzillo Decl. – New York MSA*, at 12; *Lew/Verses/Garzillo Decl. – Philadelphia MSA*, at 9; *Lew/Verses/Garzillo Decl. – Pittsburgh MSA*, at 10; *Lew/Verses/Garzillo Decl. – Providence MSA*, at 10.

⁵¹ See, e.g., *Lew/Verses/Garzillo Decl. – Boston MSA*, at 11-12, quoting an RCN press release regarding the reach of the RCN network in the Boston MSA. See also *Lew/Verses/Garzillo Decl. – New York MSA*, at 13; *Lew/Verses/Garzillo Decl. – Philadelphia MSA*, at 11.

⁵² See *Omaha Forbearance Order*, ¶¶ 61-62; *Anchorage Forbearance Order*, ¶ 14 ("As in the *Qwest Omaha Order*, we conclude that it is appropriate for us to use the wire center service area as the relevant geographic market.").

⁵³ See *Verizon Petition – Boston*, at 1 ("This forbearance petition seeks in the Boston Metropolitan Statistical Area ("MSA") substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*. Throughout this MSA, Verizon

...Continued

an MSA (or more aggregated)⁵⁴ basis. Given the existing precedent, Verizon's failure to submit market-specific data at the outset evidences bad faith and an attempt to "game" the forbearance process.

In the *Triennial Review Remand Order*, the Commission determined that the proper geographic market for analyzing local competition under section 251(c) is the LEC wire center.⁵⁵ In rejecting an MSA-level analysis, the Commission stated:

We recognize that some imperfections are inherent in any approach we might adopt, and conclude that the other proposed geographic tests have greater defects than the one we select . . . an MSA-wide approach relying on objective, readily-available data would alleviate dramatically any concerns regarding administrability, but (as we also describe below) would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate.⁵⁶

Interestingly, Verizon was one of the most vocal proponents of adoption of a wire center-based analysis in the *Triennial Review Remand* proceeding.⁵⁷

Consistent with this standard, in the *Omaha Forbearance Order*, the Commission engaged in a wire center-specific analysis, expressly rejecting an MSA-wide approach.⁵⁸ The

faces competition from a wide range of technologies and an even broader array of providers.”). See also Verizon Petition – New York, at 1; Verizon Petition – Philadelphia, at 1; Verizon Petition – Pittsburgh, at 1; Verizon Petition – Providence, at 1; Verizon Petition – Virginia Beach, at 1.

⁵⁴ Some of the data proffered by Verizon is nationwide in scope. See, e.g., *Lew/Verses/Garzillo Decl. – Boston MSA*, at 9 (“Comcast is providing voice service to more than 1.7 million customers nationwide, and reports that it is adding an average of more than 17,000 customers per week.”). See also *Lew/Verses/Garzillo Decl. – New York MSA*, at 9; *Lew/Verses/Garzillo Decl. – Philadelphia MSA*, at 12; *Lew/Verses/Garzillo Decl. – Pittsburgh MSA*, at 10; *Lew/Verses/Garzillo Decl. – Providence MSA*, at 10.

⁵⁵ See *Triennial Review Remand Order*, at ¶ 155-56.

⁵⁶ *Triennial Review Remand Order*, ¶ 155.

⁵⁷ *Id.* (“Consistent with the position of several incumbent LECs, including Verizon and SBC, we find that the area served by a wire center is the appropriate geographic market.”).

Commission found that an MSA-based analysis was inappropriate because “[u]sing such a broad geographic region would not allow us to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obligations.”⁵⁹ This principle was followed in the recently-decided Anchorage forbearance proceeding. There, the Commission granted ACS forbearance from section 251(c)(3) unbundling obligations in five of the 11 wire centers in the Anchorage study area, finding that the level of facilities-based competition in those specific locations will ensure that market forces will protect the interests of consumers.⁶⁰ The Commission stated explicitly in the *Anchorage Forbearance Order* that a wire center-based analysis was required because competitive conditions vary across an MSA or a study area, and wire centers “are sufficiently small and discrete to enable us to grant forbearance in the geographic areas where the standards of section 10 are satisfied, without being administratively unworkable, as would be the case with a loop-by-loop (or customer-by-customer) analysis.”⁶¹

The *Triennial Review Order* and the Commission’s decisions in the Omaha and Anchorage forbearance dockets make it clear that wire center-specific evidence is essential to the Commission’s analysis. Verizon has not justified a departure from this well-established principle and, at the same time, it has not provided a scintilla of factual evidence regarding the state of local competition on a wire center-specific basis in the relevant MSAs. In the absence of

⁵⁸ *Omaha Forbearance Order*, n. 186.

⁵⁹ *Id.*

⁶⁰ *Anchorage Forbearance Order*, ¶¶ 14, 16.

⁶¹ *Id.* ¶ 16 (footnotes omitted).

this data, the Commission's only reasonable course of action is to dismiss Verizon's Petitions on the ground that Verizon has failed to sustain its burden of proof.

Importantly, Verizon should not be permitted to use the *ex parte* process to game this proceeding. Verizon's petitions should be evaluated and judged by the Commission as they were presented by Verizon at the time of filing. After all, Verizon in its sole discretion determined the timing of its filings and the nature and extent of supporting data to include with its Petitions. If Verizon is permitted to offer additional empirical data through the *ex parte* process, parties with a critical interest in the outcome of this proceeding, and the Commission itself, will be forced to evaluate and respond to a moving target, and likely will not have a full and fair opportunity to address the new information.⁶² As stated in the *Omaha Forbearance Order*, the Commission is under no obligation to evaluate a forbearance petition "otherwise than as pled."⁶³ Accordingly, the Commission should consider Verizon's Petitions as filed and, after doing so, dismiss them for failure to sustain their burden of proof.

IV. VERIZON'S PETITIONS SHOULD BE DENIED ON THE MERITS BECAUSE VERIZON HAS NOT ESTABLISHED THAT SUFFICIENT COMPETITION EXISTS WITHIN EACH RELEVANT MARKET TO WARRANT FORBEARANCE FROM STATUTORY UNBUNDLING REQUIREMENTS

In the event that the Commission does not dismiss Verizon's Petitions, the Commission should deny Verizon forbearance from section 251(c)(3)'s unbundling requirements. The burden of proof to justify forbearance clearly falls upon Verizon as the

⁶² Allowing Verizon to submit more granular empirical evidence at this point in time (or in the future) would be highly prejudicial. Six months, representing one-half of the statutory period provided for evaluation of the forbearance requests, have passed since the Petitions were filed. Rather than allow Verizon to submit more granular information at this point – should Verizon seek to avoid dismissal through such a ploy – the Commission should dismiss the Petitions and allow Verizon to refile with more granular data, starting the twelve-month statutory clock anew.

⁶³ *Omaha Forbearance Order*, n. 161.

petitioning party,⁶⁴ and to meet the first two prongs of section 10(a), Verizon must prove that enforcement of section 251(c)(3) is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement of section 251(c)(3) is not necessary for the protection of consumers.⁶⁵ Verizon, for all practical purposes, has made no attempt to demonstrate that sufficient competition exists in the relevant markets to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory and that enforcement of section 251(c)(3) and the other provisions it requests forbearance from are not necessary for the protection of consumers, as required by Section 10(a).

Importantly, Verizon fails to present its analysis in terms of the relevant geographic markets that were used in the *Triennial Review Remand Order* unbundling analysis and in the Omaha and Anchorage forbearance proceedings, *i.e.* the wire center. Verizon also fails to address the appropriate product markets. It is *not* the burden of either the Commission or other interested parties to extrapolate this data, sort these issues out and, after identifying the relevant markets, to apply the hodgepodge of anecdotes and general information Verizon provided with its Petitions in an attempt to conduct the careful analysis Verizon chose not to undertake. Verizon has the burden of demonstrating that sufficient facilities-based competition *for each relevant product market exists in the relevant geographic market* before forbearance can be approved for network elements used to serve *that product market in that geographic market*. There is no short-cut available to Verizon, as the Commission made clear in the *Omaha Forbearance Order*. There, the Commission granted forbearance in only nine of the 24 wire

⁶⁴ See Section II, *supra*.

⁶⁵ 47 U.S.C. § 160(a).

centers in the Omaha MSA.⁶⁶ Similarly, in the more recent Anchorage decision, the Commission granted forbearance to the incumbent in only five of the carrier's 11 wire centers.⁶⁷

Verizon – not opponents or the Commission – must be required to disaggregate the evidence it has assembled in support of its Petitions and present the data for each product market in each geographic market before its forbearance requests can be entertained. In the absence of such disaggregated evidence, Verizon cannot sustain its burden of proof that section 251(c)(3) unbundling is not needed to protect consumers and to ensure that its rates and charges are just and reasonable and not unreasonably discriminatory.

A. Verizon's Analysis Inappropriately Ignores the Relevant Geographic Markets

In each of its Petitions, Verizon treats the entire MSA as the relevant geographic market.⁶⁸ By this, Verizon appears to be suggesting that competition is ubiquitously sufficient throughout each MSA to justify forbearance and that no more-granular analysis is required. The *Omaha Forbearance Order* and the *Anchorage Forbearance Order* make it impossible to accept this contention without substantial proof. Both of those decisions considered section 251(c)(3) forbearance on a wire-center-by-wire-center basis, in conformity with the Commission's *Triennial Review Remand Order*.⁶⁹ Verizon has made no effort to justify a deviation from these earlier decisions. Indeed, Verizon nowhere addresses why it believes the MSA is the appropriate geographic market notwithstanding this well-established precedent. The only way for Verizon to

⁶⁶ *Omaha Forbearance Order*, ¶ 61.

⁶⁷ *Anchorage Forbearance Order*, ¶ 2.

⁶⁸ See Verizon Petition - Boston, at 2, 4; Verizon Petition – New York, at 2, 4; Verizon Petition – Philadelphia, at 2, 4; Verizon Petition – Pittsburgh, at 1-2, 4; Verizon Petition – Providence, at 2, 4; Verizon Petition – Virginia Beach, at 2-4. Importantly, as discussed below, Verizon often blurs the distinction between the mass market and the enterprise market in order to support its argument that forbearance is appropriate in both markets.

⁶⁹ *Triennial Review Remand Order*, ¶¶ 155-56.

substantiate its claims for forbearance is to conduct the very wire-center-by-wire-center analysis which it steadfastly avoids.

B. Verizon Fails to Show Sufficient Facilities-Based Competition Exists In Any Relevant Product Market For Any Wire Center

Verizon attempts to evade a wire-center-by-wire-center analysis by providing a litany of anecdotes regarding actual or would-be competitors that are or “soon” will be providing competition in some percentage of the territory or to a certain fraction of the end users within the MSA.⁷⁰ Verizon offers MSA-wide, state-wide, and even national information to support its Petitions, but such information is worthless to complete the sort of market-specific analysis required by section 10. Central to its effort, Verizon recites the names of many cable-based, wireless, Voice over Internet Protocol (“VoIP”), and CLEC providers purportedly offering competing services.⁷¹ But upon examination, Verizon fails to meet its burden of proof because the information it provides does not further a meaningful wire center-based analysis.

Verizon has utterly failed to show that these various providers represent a sufficient measure of facilities-based competition for the purpose of the Commission’s forbearance analysis. It is uniformly unclear the extent to which any of these entities actually compete with Verizon in the relevant geographic markets (*i.e.*, wire centers) *today* because Verizon has not attempted to make such a showing. Further, to the extent there is some actual

⁷⁰ See, e.g., Verizon Petition - Boston, at 5 (“Comcast also has said it plans to market its voice service to 80 percent of its nationwide footprint by the end of 2006.”). See also Verizon Petition – Philadelphia, at 5; Verizon Petition – Pittsburgh, at 4; Verizon Petition – Providence, at 5.

⁷¹ See, e.g., Verizon Petition - Boston, at 22 (“Such competitors include traditional telecom carriers such as AT&T, Level 3, Sprint, Global Crossing, PAETEC, Broadwing, and One Communications; managed service providers and systems integrators such as IBM, Electronic Data Systems Corp. Accenture, Northrop Grumman, and Lockheed Martin, and equipment vendors such as Lucent and Nortel.”). See also Verizon Petition – New York, at 23; Verizon Petition – Philadelphia, at 23; Verizon Petition – Pittsburgh, at 21; Verizon Petition – Providence, at 21; Verizon Petition – Virginia Beach, at 21.

competition in some wire centers, Verizon is silent regarding the extent to which these entities are providing service using their own facilities without dependence upon the very UNEs for which it seeks forbearance. In the *Omaha Forbearance Order*, the Commission found it crucial that the primary competitor to Qwest “has been successfully providing local exchange and exchange access services in [the wire centers in which the Commission granted forbearance] *without relying on Qwest’s loops and transport.*”⁷²

Similarly, in the *Anchorage Forbearance Order*, the Commission found the extent to which ACS’s competitor, GCI, has constructed last-mile facilities to be highly relevant to its forbearance analysis and limited its grant of forbearance to “those locations where the record indicates that GCI provides sufficient facilities-based competition to ACS to satisfy the forbearance criteria of section 10(a).”⁷³ The Commission in the *Anchorage Forbearance Order* reiterated:

Forbearing from section 251(c)(3) or section 252(d)(1) of the Act where no competitive carrier has constructed substantial competing last-mile facilities capable of providing telecommunications services is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that today is benefiting customers in the Anchorage study area.⁷⁴

Yet in its Petitions, Verizon provides no evidence regarding the extent to which section 251(c)(3) UNEs or other Verizon wholesale facilities are relied upon by the competitors it claims support its forbearance requests. This absence of data cannot be overlooked and demonstrates Verizon’s failure to meet its burden of proof.

⁷² *Omaha Forbearance Order*, ¶ 64 (emphasis supplied).

⁷³ *Anchorage Forbearance Order*, ¶ 21.

⁷⁴ *Id.*, ¶ 23.

The Commission has made clear in previous forbearance cases that the mere *potential* for competition does not justify the grant of forbearance. While the potential for competition may be a factor, a threshold of *actual* facilities-based competition is required.⁷⁵ In the *Omaha Forbearance Order*, the Commission concluded that although “Coverage Share”⁷⁶ is relevant to a section 251(c)(3) forbearance determination, a “Retail Market Share” test must be met and competition in the wholesale market must be analyzed before forbearance in any wire center is appropriate.⁷⁷ The Commission expressed this point clearly when it stated:

While Qwest seeks relief from the obligations of section 251(c)(3) in its entire service area within the MSA, . . . the criteria for section 10(a) are not satisfied in all of Qwest’s territory in this MSA. The merits of the Petition warrant forbearance only in locations where Qwest faces sufficient facilities-based competition to ensure that the interests of consumers and the goals of the Act are protected . . .

* * *

We tailor Qwest’s relief to specific thresholds of facilities-based competition from Cox.”⁷⁸

Moreover, as noted above, this competition must be through a carrier’s own facilities, not reliant upon the incumbent local exchange carrier’s (“ILEC’s”) facilities. In the *Omaha Forbearance Order*, the Commission stated emphatically that

⁷⁵ *Omaha Forbearance Order*, ¶ 62.

⁷⁶ Coverage Share, as employed in the *Omaha Forbearance Order*, refers to whether a competing carrier “is willing and able within a commercially reasonable time” to provide service in each relevant product market to customers served by a specific wire center within the footprint of the ILEC. *Id.*, ¶¶ 62, 69 (granting Qwest forbearance in the mass market in those Omaha wire centers where Cox’s voice-enabled cable plant covers at least [REDACTED] percent of the end user locations in that wire center).

⁷⁷ The Retail Market Share test employed in the *Omaha Forbearance Order* refers to the number of local end users *actually* served by a competing carrier, or the percentage of the retail local exchange market *captured* by a competing carrier in *each* relevant product and geographic market. *Id.*, ¶ 66 (examining the number of voice customers Cox has obtained). *See also id.*, ¶ 67 (discussing the role of the wholesale market).

⁷⁸ *Id.*, ¶¶ 61-62.

Forbearing from section 251(c)(3) and the other market-opening provisions of the Act and our regulations where no competitive carrier has constructed substantial competing “last mile” facilities is not consistent with the public interest and likely would lead to a substantial reduction in the retail competition that is today benefiting customers in the Omaha MSA.⁷⁹

Further, Commission precedent requires that Verizon provide evidence of actual facilities-based competition in wholesale as well as retail markets. Since Verizon seeks forbearance from the section 251(c)(3) unbundling obligation for wholesale services, the Commission’s analysis must consider the effects that a grant of forbearance would have on consumers of wholesale services as well as consumers of retail services. And, as the Commission correctly noted in the *Anchorage Forbearance Order*, “[c]ompetition in the retail market can be directly affected by the level of competition and the availability of inputs in an upstream wholesale market (*e.g.*, DS0 and high-capacity loops).” Verizon has not attempted to make the required showing.⁸⁰

Finally, data showing declines in Verizon’s residential switched access lines and business lines provide no evidence of the actual facilities-based competition that is a prerequisite to section 251(c)(3) forbearance relief. In support of its Petitions, Verizon cites decreases (between 2000 and 2005) in its retail residential switched access lines and its business lines, contending that these line losses show that “various competitive alternatives are widely used in the [] MSA.”⁸¹ In reality, these figures show nothing regarding the state of competition in these MSAs. The Commission recognized this in the *Anchorage Forbearance Order* where it

⁷⁹ *Id.*, ¶ 60.

⁸⁰ *Anchorage Forbearance Order*, n. 82.

⁸¹ Verizon Petition – Boston, at 2. *See also* Verizon Petition – New York, at 2; Verizon Petition – Philadelphia, at 2; Verizon Petition – Pittsburgh, at 2; Verizon Petition – Providence, at 2; Verizon Petition – Virginia Beach, at 2.

“reject[ed] ACS’s contention that the sheer fact of its line loss compels forbearance.”⁸² As the Commission correctly noted in the *Anchorage Forbearance Order*, line loss by an ILEC “does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access.”⁸³ It also may indicate that the consumer has abandoned its wireline voice service in favor of a wireless offering. Before Verizon can argue that line loss data should be included in the Commission’s forbearance analysis, it must show that decreases in its line counts are not attributable to consumers moving from one Verizon product to another Verizon service offering.⁸⁴ Verizon has offered no such evidence here.

As further shown below, Verizon has failed to provide sufficient evidence of the actual wholesale or retail facilities-based competition that is the absolute prerequisite to a finding that the consumer protection requirements of section 10(a) have been met and the grant of forbearance for any wire center in any of the six MSAs identified in its Petitions is justified. This fatal shortcoming is not surprising in light of existing evidence that the markets at issue are highly concentrated. In New York State, for example, the Department of Public Service Staff (“NYS Staff”) concluded, in the context of the Verizon-MCI merger proceeding, that pre-merger, the mass market in New York was “highly concentrated” and that the merger of Verizon

⁸² *Anchorage Forbearance Order*, n. 88.

⁸³ *Id.*

⁸⁴ See *Verizon’s 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband and Business Markets* (Jan. 29, 2007) available at <http://investor.verizon.com/news/view.aspx?NewsID=813> (claiming Verizon Wireless is the nation’s leading wireless carrier in terms of revenue and number of retail subscribers).

and MCI would significantly increase that concentration by more than an acceptable threshold.⁸⁵ Similarly, NYS Staff found that “[t]he merger of Verizon and MCI present[ed] significant market concentration issues in the medium and large business, voice and data markets . . .”⁸⁶ More recently, Verizon withdrew its request for further deregulation of its retail business services in New York in the face of evidence showing Verizon’s dominance in those services.⁸⁷

1. Cable Competition

Verizon’s principal foundational basis in each Petition is the presence of cable competitors in the relevant MSA. Although various cable companies may have upgraded their cable plant to provide cable-based telephony and thus may provide some measure of facilities-based competition in each MSA, the Verizon Petitions simply fail to heed the unequivocal mandate from the Commission regarding the necessity for a wire-center-by-wire-center analysis of the presence of facilities-based competition. Instead, Verizon relies upon insufficient and MSA-wide representations of competition by cable providers generally, making it largely impossible to ascertain the extent of actual competition in any of the myriad wire centers in the six markets at issue.⁸⁸

⁸⁵ See *Department of Public Service Staff White Paper*, (“NYS Staff White Paper”), Case Nos. 05-C-0237, 05-C-0242, New York State Public Service Commission (Jul. 6, 2005), at 25.

⁸⁶ *Id.* at 26-27.

⁸⁷ See *A Critical Examination of the Verizon Report: Understanding the Level of Business Competition in New York*, attached to the Joint Comments of COMPTTEL, Cordia Communications, Covad Communications, InfoHighway Communications, Smart Choice Communications, Transbeam, and XO Communications, Case No. 06-C-0897, New York Public Service Commission (filed Sept. 25, 2006).

⁸⁸ See, e.g., Verizon Petition – New York, at 4-5 (discussing cable competition in the MSA). See also Verizon Petition – Philadelphia, at 4-5; Verizon Petition – Pittsburgh, at 4-5; Verizon Petition – Providence, at 4-5; Verizon Petition – Virginia Beach, at 4-5; Verizon Petition – Boston, at 4-5.

a. Mass Market

Verizon focuses heavily on E911 listings for residential customers of cable providers to show that cable providers offer voice services throughout their entire franchise areas and as a proxy for voice competition from cable providers in the overall mass market.⁸⁹ This approach is woefully deficient for several reasons. First, nowhere does Verizon identify the degree of competition in any particular wire center. Instead, Verizon focuses simplistically on the overall number of wire centers in the MSA in which cable competitors serve residential customers, which is a far cry from demonstrating the retail market share (or coverage potential) of any competitor *within* these wire centers. For example, in New York, Verizon notes that “cable companies in the New York MSA collectively provide voice service to residential customers in wire centers that account for [redacted] percent of Verizon’s residential access lines in the MSA.”⁹⁰ Verizon says nothing regarding the actual share of any cable company within any given wire center. This generalized information does not account for different cable providers “covering” different areas within each MSA nor does it recognize that different cable providers possess different penetration levels within each MSA.

Further, Verizon’s E911 data is only for a subset of the mass market; Verizon proffers no E911 listings for small business customers.⁹¹ There is no basis to conclude, as does

⁸⁹ As discussed in Section III.B, *supra*, Verizon’s reliance on E911 data is unauthorized and inappropriate, and should not be permitted by the Commission.

⁹⁰ Verizon Petition – New York, at 4-5.

⁹¹ See Verizon Petition – New York, at 6 (discussing cable competition in the MSA). See also Verizon Petition – Boston, at 6; Verizon Petition – Philadelphia, at 6; Verizon Petition – Pittsburgh, at 6; Verizon Petition – Providence, at 5; Verizon Petition – Virginia Beach, at 5-6.

Verizon,⁹² that inclusion of small business data would demonstrate an *increased* state of competition for mass market customers. It is well documented that cable companies have generally achieved less market share for small business customers than they have for residential subscribers.⁹³ Consequently, if small businesses were factored into the competitive equation, cable companies' overall mass market share likely would be *smaller*.

Verizon has also failed to demonstrate the number of wire centers in which the cable companies offer voice service to residential customers using their own upgraded facilities. As explained above, it is the degree of *facilities-based* competition that is of prime importance in a forbearance analysis. Without such data, the presence of secondary factors, such as competitors that rely on Verizon's wholesale alternatives to provide retail services in competition with Verizon, must be presumed. Such secondary factors likely result in significantly weaker competitive environments which cannot justify forbearance.⁹⁴ Before the Commission can rely upon Verizon's claims regarding cable competition for mass market telephony services, Verizon must adequately demonstrate (1) that cable providers do not rely materially on section 251(c)(3) UNEs or other Verizon wholesale facilities in the various wire centers;⁹⁵ and (2) that each cable

⁹² See, e.g., Verizon Petition – New York, at 6 (“these data [concerning the percentage of wire centers in which cable companies collectively provide service] likely understate the extent of competition for mass market customers as a whole”). See also Verizon Petition – Philadelphia, at 6; Verizon Petition – Pittsburgh, at 6; Verizon Petition – Providence, at 5; Verizon Petition – Virginia Beach, at 5; Verizon Petition – Boston, at 6.

⁹³ See, e.g., <http://www.cable360.net/ct/voice/20147.html>.

⁹⁴ Exhibit 1 to the Lew/Verses/Garzillo Declaration, which shows the prices of retail services, is not particularly germane to consideration of whether the Commission should continue to obligate Verizon to provide key elements to the provision of retail services by competitors. There is no way to ascertain the extent to which the retail services listed in the Lew/Verses/Garzillo Declaration are being provided by competitors using their own facilities.

⁹⁵ Verizon sidesteps the issue of whether the cable providers at issue are ubiquitously present within their franchise areas. Nor does Verizon demonstrate that, for each wire

...Continued

provider upon which Verizon relies is substantially present in each wire center with its own plant, including facilities and nodes technically able to provide voice-grade services.

Tellingly, Verizon reaches even beyond MSA-wide data in an effort to provide support for its requests. In an attempt to demonstrate how cable operators are growing in the relevant MSAs, Verizon offers *nationwide* projections of growth.⁹⁶ These projections prove nothing about the geographic coverage or the potential for subscriber or market share increases for telephony within the specific MSAs at issue, let alone within the relevant geographic markets (*i.e.*, wire centers) within those MSAs. The Commission should completely disregard such aggregate data.

At bottom, Verizon offers no data regarding cable provider penetration for telephony services in the mass market on a wire-center-by-wire-center basis. Yet Verizon brazenly quotes back select phrases from the Commission's concluding paragraph in the *Omaha Forbearance Order* regarding the sufficiency of cable-based competition to justify forbearance in certain wire centers, inserting Verizon's name instead of Qwest's.⁹⁷ Based on the record Verizon has assembled, its attempt to rely on the Commission's language regarding cable-based telephony competition must fall on deaf ears. Given the primary role assigned cable-based competition in Verizon's Petitions with reference to the mass market, the Commission should

center at issue, the cable providers' franchise areas subsume the entire wire center or, at a minimum, reach a certain percentage of subscribers within each wire center.

⁹⁶ See, *e.g.*, Verizon Petition – New York, at 7 (including reports of national growth rates for the three cable companies competing in the New York MSA). See also Verizon Petition – Philadelphia, at 7; Verizon Petition – Pittsburgh, at 7; Verizon Petition – Providence, at 6-7; Verizon Petition – Virginia Beach, at 7; Verizon Petition – Boston, at 7. Significantly, the cable providers whose national growth rates are cited by Verizon provide service in wide geographic areas well beyond the boundaries of the MSAs for which Verizon seeks forbearance.

⁹⁷ See Verizon Petition – New York, at 8; Verizon Petition – Philadelphia, at 7-8; Verizon Petition – Pittsburgh, at 7-8; Verizon Petition – Providence, at 7; Verizon Petition – Virginia Beach, at 7; Verizon Petition – Boston, at 7-8.

conclude on this basis alone that the section 10(a) standard has not been met and that forbearance is not warranted.

b. Enterprise Market

Verizon similarly fails to meet its burden of proof regarding cable-based telephony competition in the enterprise market. Unlike the residential and small business markets, the medium-sized and large businesses that comprise the enterprise market generally require more sophisticated services than traditional voice-grade DS0s, such as DS1 services, fractional DS1s, and other high capacity services. Verizon fails to demonstrate that cable competitors are able – or will be able within a commercially reasonable period of time – to adequately serve such customers with their current cable plant. Verizon also ignores problems inherent to cable-based provision of services to the enterprise market due to a lack of physical proximity, technical inability, or both.⁹⁸ To the extent cable companies have deployed some amount of fiber or other infrastructure within the relevant MSAs that can support high-capacity telephony services, they can only serve businesses within close proximity to such infrastructure, an operational reality which cautions against broad conclusions regarding the availability of competitive enterprise services without engaging in a more detailed wire center-specific analysis as required by the Commission. As succinctly stated by the NYS Staff:

[C]able-based telephony is of little assistance to the enterprise market at this point in time since most small and medium-sized businesses are not ‘cabled-up’ (i.e. current cable-based services are television rather than voice driven) and larger businesses generally have T-carrier systems for their telecommunications needs . . .⁹⁹

⁹⁸ Based on industry norms, enterprise customers for standard “off-the-shelf” services expect to receive service within 30 calendar days. The time frame for mass market customers is between 10-14 calendar days.

⁹⁹ *NYS Staff White Paper*, at 31.

As an initial matter, Verizon points to the Commission’s analysis in the *Verizon-MCI Merger Order* as support for its claim that there is sufficient actual enterprise market competition in the six MSAs today.¹⁰⁰ Verizon’s reliance is unfounded. In conducting its merger analysis, the Commission examined competition from a very different standpoint than in the present context. Specifically, the conclusions the Commission reached in the merger context were based principally on the existence of retail competition, without a deeper consideration of whether the retail competition was facilities-based or not. Indeed, when examining the presence of competition in the Verizon-MCI merger proceeding, the Commission relied, in large part, on the continued availability of UNEs, the very items which Verizon now seeks to eliminate.¹⁰¹ Moreover, the Commission’s conclusions in the *Verizon-MCI Merger Order* were not the result of the type of wire-center-by-wire-center analysis called for in this context.¹⁰² Consequently, the Commission’s conclusions in the *Verizon-MCI Merger Order* regarding the state of competition in the relevant markets, whether in general or in particular, are of no comparative value.

Here, Verizon offers no evidence that cable companies are providing extensive facilities-based telephony services to enterprise customers today. Instead, Verizon focuses solely on the presence of the franchised cable networks in each MSA as evidence that the cable companies possess “the necessary facilities to provide enterprise services.”¹⁰³ In each Petition, Verizon aggregates a series of anecdotes from the cable companies regarding their outreach to

¹⁰⁰ See Verizon Petition – Boston, at 21-22; Verizon Petition – New York, at 22-24; Verizon Petition – Philadelphia, at 22-24; Verizon Petition – Pittsburgh, at 20-22; Verizon Petition – Providence, at 20-22; Verizon Petition – Virginia Beach, at 20-21.

¹⁰¹ See *Verizon-MCI Merger Order*, ¶ 81 (referring to the Commission’s analysis of the wholesale special access market and the availability of UNEs).

¹⁰² See generally *id.*, at ¶¶ 56-81.

¹⁰³ See Verizon Petition – Boston, at 18; Verizon Petition – New York, at 19; Verizon Petition – Philadelphia, at 20; Verizon Petition – Pittsburgh, at 18; Verizon Petition – Providence, at 18; Verizon Petition – Virginia Beach, at 19.

the business marketplace. Notably, cable companies have for some time provided telephony services to business customers, often under their name, but frequently using a separate network or leased facilities. In either case, the facilities are *not* part of the company's franchised cable system. For instance, Cablevision's Optimum Lightpath network, as explained on the company's website, "supports speeds ranging from 10 Mbits/sec to 10 Gbits/sec, delivered via fiber-optic connections that run directly to businesses' locations"¹⁰⁴ Other industry observers note that "[c]able operators are delivering commercial services using *a range of technologies*, including optical Ethernet and TDM links, DOCSIS cable modem connections, Ethernet over coax and last-mile wireless solutions."¹⁰⁵ It is virtually impossible to sort out from the snippets Verizon has assembled the extent to which the enterprise-level telephony services in question are being provided over franchised cable facilities versus unrelated fiber facilities owned by the cable companies or leased from other providers. Verizon has sought to imply that cable companies' locally-franchised networks are equivalent to the area in which they can provide enterprise-level telephony services. Drawing such a conclusion would be erroneous and is not justified.¹⁰⁶

¹⁰⁴ See <http://www.optimumlightpath.com/Interior33-3.html>. This site makes clear that this network bears no particular relationship to the company's franchised cable system. See also Peter Grant, "Cable Operators Woo Small-Business Subscribers in Battle For Telecom Turf," Wall Street Journal, Jan. 17, 2007, pp. A1, A17 (specifying that Cablevision's Lightpath subsidiary sells services to business customers "over a separate network.").

¹⁰⁵ Cox Business, Cable Gets Down to Building Business, March 31, 2005, posted at <http://www.coxbusiness.com/pressroom/recentmedia/03-31-05-bs.html> (emphasis added).

¹⁰⁶ In the *Anchorage Forbearance Order*, the Commission noted that GCI served sophisticated business customers' telephony needs using a fiber optic network separate from its cable network, and the Commission noted that GCI's fiber optic network "is not deployed as ubiquitously as its cable plant." *Anchorage Forbearance Order*, n. 121. Thus, the Commission cannot rely on the apparent extent of a cable provider's cable franchise to determine the potential for the cable provider to provide facilities-based telephony to enterprise customers.

All indications are that cable providers *operating their cable-technology facilities* still do not occupy a meaningful position in the business marketplace, at least one sufficient at this time to support forbearance from section 251(c)(3) unbundling obligations. In the *Triennial Review Remand Order*, the Commission found that cable transmission facilities are not used to serve business customers to any significant degree.¹⁰⁷ More recently, in support of their merger application, AT&T and BellSouth claimed that competition from cable operators for small and medium-sized businesses may only become prevalent toward the end of this decade.¹⁰⁸ In November 2006, when reporting on the state of the cable industry, UBS focused solely on results among residential consumers (*i.e.*, households), declining to mention any business services.¹⁰⁹ It may be that some cable providers recently have announced plans to expand their focus on business services or have begun to make modest inroads with very small businesses, but it is difficult (and highly speculative) to anticipate the degree to which they will be successful in the near-term, despite their boasts regarding availability and speed of delivery. Thus, suggestions by Verizon in its Petitions that cable operators provide significant facilities-based competition in the enterprise market remain more fantasy than reality, and a contrary conclusion is not merited on the basis of the string of selected quotes by Verizon taken from marketing materials on the cable operators' websites.

To the extent that cable companies intend to rely on their traditional cable systems rather than other modes of delivery to provide telephony to enterprise customers, cable system

¹⁰⁷ *Triennial Review Remand Order*, ¶ 193.

¹⁰⁸ *Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.*, WC Docket No. 06-74, at 81.

¹⁰⁹ UBS Investment Research, Wireline Postgame Analysis 14.0, Recap of Third Quarter 2006 Results, 22 November 2006, at 6, 35.

technology still faces serious technical and operational hurdles before it can be used to provide enterprise level services in any competitively meaningful fashion. Simply because a cable system passes near a business location does not mean that the cable operator can serve that business customer within a commercially reasonable period of time, if at all. Existing cable technology does not yet support the provision of reliable, economic, or large scale services at a DS1 level to enterprise customers, primarily because of timing/clocking and upstream bandwidth problems.¹¹⁰ While CableLabs, the recognized standards body for the cable industry, issued specifications in May 2006 to address the timing/clocking problems in part, full commercial deployment is expected no sooner than mid-2008.¹¹¹ In order to provide enterprise-level telephony services, even if the timing/clocking problems are solved, cable systems must make significant upgrades to their network capacity at considerable expense. Otherwise, cable systems will remain seriously constrained in the amount of enterprise-level services they can accommodate.¹¹²

There is no evidence offered in the Petitions which shows that cable systems are currently capable of offering significant levels of facilities-based telephony services to enterprise customers in any of the relevant MSAs, let alone the wire centers which form the relevant geographic markets. Indeed, shortly after Verizon filed its Petitions, Credit Suisse noted that the country's largest cable operator, Comcast (a relevant cable operator in the Boston, New York,

¹¹⁰ See, e.g., Letter from John Nakahata, Counsel for General Communication Inc. ("GCI"), to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (Nov. 14, 2006), at 9 ("*GCI Nov. 14 Ex Parte*"); Comments of GCI on ACS of Anchorage, Inc. Forbearance Petition, WC Docket No. 05-281, (Aug. 11, 2006), at 14-15, 17.

¹¹¹ *Id.*

¹¹² The Commission acknowledged these issues in the *Anchorage Forbearance Order*, referencing GCI's statements that "it will need to undertake a 'large-scale upgrade of its network capacity before it can provide all business customers with DS1 services over its [cable] plant.'" *Anchorage Forbearance Order*, n. 137.

Philadelphia, Pittsburgh, and Providence MSAs), “is still in the early stages of starting up its commercial telecom business. . . . It’s going to take some time to develop business plans, establish operations (e.g., product development, customer support, field operations, and sales), and to then ramp up the business throughout Comcast’s footprint.”¹¹³ Moreover, while cable operators are reportedly venturing into the business arena, they are typically targeting smaller businesses, not large enterprises.¹¹⁴ As reported last October, “[c]able operators generally avoid the large business, or ‘enterprise,’ market. Those customers, from regional banks to giant corporations – have complicated demands and locations in multiple cities.”¹¹⁵ And Comcast itself recently projected that cable-supported business services will be a new growth engine for cable operators, but “in 5-plus years.”¹¹⁶

In short, the provision of competitive facilities-based telephony to enterprise customers using cable technology is several years in the future, at the least. Such competition is not present today, and every indication is that it will not be available in a reasonable timeframe. This is especially true for large business customers.¹¹⁷ Accordingly, there is not sufficient competition from cable companies in the enterprise market to support forbearance relief in any of the six markets that are the subject of Verizon’s Petitions.

¹¹³ Credit Suisse, *More Upside in Comcast: Comcast Report*, 8 (Sept. 22, 2006).

¹¹⁴ See Peter Grant, “Cable Operators Woo Small-Business Subscribers in Battle For Telecom Turf,” *Wall Street Journal*, Jan. 17, 2007, at A1, A17.

¹¹⁵ John M. Higgins, *Cable’s Next Big Thing*, *Broadcasting & Cable*, Oct. 9, 2006, at 18.

¹¹⁶ *Comcast May Eventually Provide Phone, Broadband, and Video Services Wirelessly*, *Communications Daily*, Sept. 21, 2006, at 11.

¹¹⁷ Comcast, for example, sees its growth in business focused primarily in the small and medium-sized business sector, which it views as a separate market. See UBS Investment Research, *Comcast Corporation Site Visit*, 20 November 2006, at p. 10.

2. Competition from Wireless Services

Like competition from cable-based services, any competition Verizon currently experiences from wireless services does not support the forbearance Verizon requests. Indeed, wireless services are not relevant to the present forbearance analysis because, as the Commission recognized in the *Omaha Forbearance Order*, wireless penetration data generally is not available to support a wire-center based analysis. In the *Omaha Forbearance Order*, the Commission found that:

Qwest has not submitted sufficient data concerning the full substitutability of interconnected VoIP and wireless services in its service territory in the Omaha MSA, and *because the data submitted do not allow us to further refine our wire center analysis, we do not rely here on intermodal competition from wireless and interconnected VoIP services to rationalize forbearance from unbundling obligations.*¹¹⁸

The Commission made a similar finding in the *Anchorage Forbearance Order*, noting the lack of sufficient data to evaluate the extent of substitution of wireless services in the Anchorage study area.¹¹⁹ The conclusion reached by the Commission in the Omaha and Anchorage forbearance proceedings is equally applicable here, since Verizon has failed to offer any data differing from (or more substantial than) the data provided by the petitioning party in the Omaha or Anchorage dockets.

To the extent wireless competition is considered by the Commission in its forbearance analysis, which it should not be, wireless competition does not come anywhere close to tipping the scales in favor of forbearance. At the outset, Verizon's Petitions offer no evidence, and indeed no discussion whatsoever, regarding wireless service as a competitor in the enterprise

¹¹⁸ *Omaha Forbearance Order*, ¶ 72 (emphasis supplied).

¹¹⁹ *Anchorage Forbearance Order*, ¶ 29.

market. Verizon therefore has absolutely failed to meet its burden of proof in this regard, and further discussion regarding wireless competition in the enterprise market is not necessary.

Verizon does not fare much better when considering wireless competition in the mass market. As an initial matter, wireless service, standing alone, cannot currently be considered a true substitute for wireline service in the mass market. Verizon's overreaching suggestion to the contrary is predicated on a faulty telephony-centric assumption. Today, wireline service gives consumers not only access to other end users for "telephone" calling but also provides access to the Internet, whether through a broadband or dial-up connection. While there are fledgling data services currently available over mobile phones, wireless access today is simply incapable of offering the sort of quality service that customers demand and have come to expect. Currently, these critical features can only be provided by telephone companies or cable providers, a fact which Verizon completely overlooks.

While a small and slowly-increasing percentage of households have become wireless-only for their voice services, the vast majority of those consumers still access the Internet using a wireline connection, which remains an essential component of their communications needs. Indeed, a recent analysis concluded that "Comcast views a wireless offering as an add-on strategy to further extend its triple play bundle [which includes voice provided over wireline/cable facilities] and to reduce churn, rather than the next leg in the company's growth."¹²⁰ As such, wireless service today cannot substitute completely for wireline access lines – it is merely complementary. This shortcoming is particularly critical in the current context, where the Commission has been asked to forbear from enforcing Verizon's obligation to provide the UNEs required by many wireline service providers. Accordingly, the

¹²⁰ See UBS Investment Research, Comcast Corporation Site Visit, 20 November 2006, at 2.

Commission should totally ignore the information proffered by Verizon regarding wireless services, as it did in the Omaha and Anchorage forbearance proceedings.

Even assuming, *arguendo*, that wireless service is capable, in theory, of serving as a complete substitute for mass market wireline service today or in a reasonably short time frame, which it is not, Verizon has still failed to meet its burden. In the recent merger proceedings involving SBC and AT&T, and Verizon and MCI, the merger applicants contended that wireless competition provided a material check on any potential competitive abuse resulting from their merger.¹²¹ Verizon, in its Petitions, contends that the Commission in the *Verizon-MCI Merger Order* embraced mobile wireless carriers as significant participants in the mass market in its operating territory.¹²² In reality, the Commission was very guarded in its reliance upon wireless mobile services in any sort of competitive analysis. Indeed, only a small percentage of wireless subscribers, at most, were deemed relevant to the Commission's evaluation. Specifically, the Commission concluded that mobile wireless services should be included within the product market for local services only with respect to the 6% of customers who rely on mobile wireless service as a complete substitute for, rather than complement to, wireline service.¹²³

¹²¹ See Joint Opposition of SBC Communications Inc. and AT&T Corp. to Petitions to Deny and Reply Comments, WC Docket No. 05-65, at 98-101 (filed May 10, 2005); Joint Submission of Verizon Communications Inc. and MCI, Inc., Mass Market White Paper, WC Docket No. 05-75, at 34-47 (filed Sept. 1, 2005). See also Letter from Christopher Heimann, SBC Communications Inc. and Lawrence J. Lafaro, AT&T Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-65, at 2 (filed Jul. 12, 2005) (noting technological advances and marketplace developments are causing a decline in traditional wireline services).

¹²² See Verizon Petition – New York, at 8-10; Verizon Petition – Philadelphia, at 8-9; Verizon Petition – Pittsburgh, at 8-9; Verizon Petition – Providence, at 7-9; Verizon Petition – Virginia Beach, at 7-9; Verizon Petition – Boston, at 8-9.

¹²³ *Verizon-MCI Merger Order*, ¶ 91. Moreover, in its merger proceeding involving Verizon and MCI, the New York Department of Public Service Staff noted that evidence that consumers view wireless as a substitute for traditional wireline service is mixed. See *NYS Staff White Paper*, at 23.

Here, where the Commission is being asked to consider forbearance from statutory unbundling requirements in the mass market,¹²⁴ there are even less compelling reasons to include wireless service in the competitive analysis. Verizon has offered no concrete evidence that wireless service has become accepted as a “complete substitute” for wireline service in a material way. That is because it is not. Verizon does not offer any data regarding complete wireless substitution on a wire center or even an MSA-wide basis,¹²⁵ rendering obsolete the Commission’s findings that only about 6% of households have chosen to rely on wireless services for all of their communications needs. While intermodal competition between wireline and mobile wireless services likely will increase in the future, wireless services do not yet enjoy the ubiquity or the service quality to qualify as a suitable substitute for wireline service offerings.¹²⁶

While Verizon offers *nationwide* projections about the number of residential wireless subscribers that may, in several years, select mobile services as their only residential service, these predictions extend far enough into the future (*e.g.*, 2010) that there is no basis to conclude that as of today (or by the date required for action by the Commission on the Petitions), wireless service is or will be generally available in a reasonable time frame as a complete substitute for mass market services. Verizon also makes broad *statewide* assertions, contending, for example, that in New York State there are more wireless subscribers than access lines served

¹²⁴ As explained above, Verizon does not even proffer wireless competition as a basis for forbearance in the enterprise market.

¹²⁵ Verizon Petition – New York, at 8-10; Verizon Petition – Philadelphia, at 8-9; Verizon Petition – Pittsburgh, at 8-9; Verizon Petition – Providence, at 7-9; Verizon Petition – Virginia Beach, at 7-9; Verizon Petition – Boston, at 8-9.

¹²⁶ *See, e.g., Triennial Review Order*, ¶ 445.

by ILECs or CLECs.¹²⁷ Not only is this data insufficiently specific, it provides no information about the extent to which wireless service is a complete substitute for wireline service.

Moreover, this assertion fails to address the fact that in a single residential household, which may have one wireline access line, there are typically multiple mobile phones, each having its own telephone number. Accordingly, any comparison of wireless phones in use and wireline access lines is likely to significantly overstate the case in wireless's favor.

Also significantly, Verizon offers no data at all regarding the number of small business users that have abandoned their wireline phone in favor of wireless services, and so therefore completely ignores this important component of the mass market. Because Verizon makes its case regarding the mass market's use of wireless alternatives based solely on residential wireless use, should the Commission consider wireless usage in the mass market in its forbearance analysis, which it should not, it should require Verizon to put forth its evidence regarding wireless substitutability among small business users in each wire center and bifurcate the mass market and address small businesses and residential subscribers as separate markets for all purposes.¹²⁸

At bottom, however, since the focus of Verizon's request for forbearance from section 251(c)(3) unbundling requirements comes down to a wire center-specific analysis, the question is whether Verizon has offered wireless data that "allows the Commission to refine its

¹²⁷ See Verizon Petition – New York, at 11-12. *see also* Verizon Petition – Philadelphia, at 8; Verizon Petition – Pittsburgh, at 8; Verizon Petition – Providence, at 8; Verizon Petition – Virginia Beach, at 8; Verizon Petition – Boston, at 8.

¹²⁸ The Commenters believe that residential and small business customers constitute separate markets. It is particularly appropriate to treat small business customers as a separate market since they are increasingly purchasing larger bandwidth circuits that are symmetric and have guaranteed service levels to meet their data requirements.

analysis.”¹²⁹ Verizon has not. Taking the New York MSA as an example,¹³⁰ Verizon refers to the presence of wireless carriers within the MSA, and can only assert that “competitive service from at least one of these carriers is available throughout the New York MSA.”¹³¹

In sum, wireless service, because of its inherent limitations, simply cannot substitute for wireline service today. At best, it remains a complement to wireline services. Verizon has failed to provide any concrete data that suggests otherwise. Moreover, Verizon has provided inadequate information to permit the Commission to take wireless competition into account in conducting its wire center-based forbearance analysis.

3. Competition from Over-the-Top VoIP Providers

In addition to cable and wireless services, Verizon points to over-the-top VoIP services (“O/VoIP”) in its attempt to demonstrate sufficient competition to warrant forbearance in the mass market.¹³² These services are simply not a source of facilities-based competition, however, because, by definition, they ride the facilities of another provider, which in many cases

¹²⁹ See *Omaha Forbearance Order*, ¶ 72.

¹³⁰ Verizon also fails in its other five Petitions to provide wire center-specific data regarding wireless services that would allow the Commission to refine its analysis. The New York petition is used for illustrative purposes, but the points made regarding Verizon’s presentation of competition from wireless services herein are applicable to all six Petitions.

¹³¹ Verizon Petition – New York, at 10. See also Verizon Petition – Philadelphia, at 10; Verizon Petition – Pittsburgh, at 10; Verizon Petition – Providence, at 10; Verizon Petition – Virginia Beach, at 10; Verizon Petition – Boston, at 10.

¹³² See, e.g., Verizon Petition – New York, at 12-14. See also Verizon Petition – Philadelphia, at 12-14; Verizon Petition – Pittsburgh, at 12-14; Verizon Petition – Providence, at 12-13; Verizon Petition – Virginia Beach, at 12-13; Verizon Petition – Boston, at 12-14. As with wireless services, Verizon does not rely on O/VoIP services to demonstrate competition in the enterprise market. While a number of carriers are beginning to integrate VoIP into their overall package of business services, these offerings are typically facilities-based and part of the larger service bundle demanded by business customers which stand-alone VoIP providers simply cannot match. Moreover, integration of such IP-enabled capabilities into a larger suite of business services is needed to meet the complex and diverse needs of an increasing number of small and medium-sized businesses in addition to enterprise business customers to ensure that they receive the quality of service they demand.

is likely to be Verizon itself.¹³³ As Verizon notes, an “underlying broadband connection [is] needed for VoIP service” and O/VoIP providers “do not operate their own loop and transport networks.”¹³⁴

Verizon’s claim that O/VoIP providers still should be considered as a source of competitive discipline on Verizon is baseless. In essence, because O/VoIP providers either use transport and loops provided by Verizon itself, other LECs, or cable companies, Verizon has accounted for these lines somewhere else in its Petition. In short, to include VoIP in the analysis would be double-counting. Moreover, as pointed out by the Virginia State Corporation Commission (“VCC”),¹³⁵ granting Verizon forbearance from section 251(c)(3) unbundling obligations would restrict the ability of carriers that rely on copper loops obtained from Verizon to offer broadband services to their customers from participating in the broadband market.

Further, Verizon has provided no indication of the extent to which O/VoIP services are being provided over Verizon’s facilities versus the facilities of other facilities-based

¹³³ Indeed, Verizon is enjoying the benefits of the growth occurring in the high-speed Internet access market. The Commission’s most recent report cites 26% nationwide growth in high-speed lines (*i.e.*, lines that deliver services at speeds exceeding 200 kilobits/second in at least one direction) and 15% growth in advanced services lines (*i.e.*, lines that deliver services at speeds exceeding 200 kilobits/second in both directions) during the first half of 2006. *High Speed Services for Internet Access: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at 2-3 (Jan. 2007). The same report shows that from December 2005 to June 2006, high-speed lines increased by approximately 1.2 million (from 3.66 million to 4.85 million) in New York State, by over 380,000 (from 1.43 million to 1.81 million) in Massachusetts, by more than 650,000 (from 1.99 million to 2.64 million) in Pennsylvania, by 25,249 (from 132,399 to 157,648) in Delaware, and by more than 420,000 (from 1.36 million to 1.78 million) in Virginia. *Id.*, Table 10. The report shows that ADSL lines are growing significantly faster than cable modem lines, and that the vast majority of ADSL lines are provided by Verizon and other Regional Bell Operating Companies (“RBOCs”).

¹³⁴ See, *e.g.*, Verizon Petition – New York, at 13.

¹³⁵ See Comments of the Virginia State Corporation Commission, WC Docket No. 06-172, p. 7-8 (filed Dec. 15, 2006) (“VCC Comments”).

carriers in the relevant geographic markets.¹³⁶ In both the *Omaha Forbearance Order* and the *Anchorage Forbearance Order*, the Commission did not consider interconnected VoIP service in its analysis because data was not available that would allow it to refine its wire center analysis, as discussed above.¹³⁷ Verizon's Petitions do not try to remedy this shortcoming. The Commission likewise should refuse to consider VoIP competition here.

For all of the foregoing reasons, the Commission should not (and cannot) include the retail market presence of O/VoIP providers in its analysis of whether there is sufficient facilities-based competition to warrant forbearance from section 251(c)(3) unbundling obligations in the mass market or the enterprise market in any wire center in any of the six MSAs that are the subject of Verizon's Petitions.

4. **Alternative Transport Facilities**

Verizon attempts to justify forbearance in the enterprise market within the six MSAs at issue on the purported existence of the "extensive competitive fiber networks" deployed by competitors.¹³⁸ Verizon's "proof" consists of figures purporting to represent the number of competitive fiber networks in each MSA. According to the data cited by Verizon, between two and 24 competitors operate fiber networks within the MSAs that are the subject of Verizon's Petitions.¹³⁹ Verizon offers maps purporting to show these fiber routes within each

¹³⁶ Without knowing the extent to which Verizon's (or other wireline providers') lines are being used to support the O/VoIP providers, it is meaningless for Verizon to cite, in support of its Petitions, analyst reports which discuss the extent to which O/VoIP will displace local telephone access lines. *See, e.g.,* Verizon Petition - New York, at n.18.

¹³⁷ *Omaha Forbearance Order*, ¶ 72. *See also Anchorage Forbearance Order*, ¶ 29.

¹³⁸ *See* Verizon Petition – Boston, at 20; Verizon Petition – New York, at 22; Verizon Petition – Philadelphia, at 22; Verizon Petition – Pittsburgh, at 20; Verizon Petition – Providence, at 20; Verizon Petition – Virginia Beach, at 20.

¹³⁹ Verizon Petition – Boston, at 20 (12 competitive fiber networks); Verizon Petition – New York, at 24 (24 competitive fiber networks); Verizon Petition – Philadelphia, at 24 (12 competitive fiber networks); Verizon Petition – Pittsburgh, at 21 (four competitive fiber networks); Verizon Petition – Providence, at 21 (four competitive fiber networks); Verizon Petition – Virginia Beach, at 21 (four competitive fiber networks). . . .*Continued*

MSA,¹⁴⁰ and represents that “these fiber routes reach virtually all areas of the . . . MSA where enterprise customers are concentrated.”¹⁴¹

There are several fundamental problems with Verizon’s data. First, the data is not disaggregated enough to permit meaningful analysis. More specifically, Verizon does not present the data on a geographic market (*i.e.*, wire center) specific basis, as required by Commission precedent. For example, it merely claims that “there are one or more known competing fiber providers in at least **[Begin Proprietary] [End Proprietary]** percent of the **[Begin Proprietary] [End Proprietary]** wire centers in the Boston MSA that account for 80 percent of Verizon’s high-capacity special access revenues.”¹⁴² Second, Verizon does not provide adequate detail to evaluate this information. Verizon does not indicate how many competing fiber providers operate in each wire center, it does not provide any substantiation for its claim that these competitive fiber networks “reach virtually all areas in the . . . MSA where

networks); Verizon Petition – Providence, at 21 (three competitive fiber networks); and Verizon Petition – Virginia Beach, at 20 (two competitive fiber networks).

¹⁴⁰ See, *e.g.*, *Lew/Verses/Garzillo Decl. – Boston*, Exhibits 5, 6.

¹⁴¹ Verizon Petition – Boston, at 21. See also Verizon Petition – New York, at 23; Verizon Petition – Philadelphia, at 23; Verizon Petition – Pittsburgh, at 21; Verizon Petition – Providence, at 20; Verizon Petition – Virginia Beach, at 20.

¹⁴² Verizon Petition – Boston, at 21. See also Verizon Petition – New York, at 22 (“there are at least 24 known competing providers that operate fiber networks within the New York MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles.”); Verizon Petition – Philadelphia, at 22 (“there are at least 12 known competing providers that operate fiber networks within the Philadelphia MSA, and those networks span approximately **[Begin Proprietary] [End Proprietary]** route miles.”); Verizon Petition – Pittsburgh, at 20 (“there are at least four known competing providers that operate fiber networks within the Pittsburgh MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles.”); Verizon Petition – Providence, at 20 (“there are at least three known competing providers that operate fiber networks within the Providence MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles.”); and Verizon Petition – Virginia Beach, at 20 (“there are at least two known competing providers that operate fiber networks within the Virginia Beach MSA, and those networks span at least **[Begin Proprietary] [End Proprietary]** route miles.”).

enterprise customers are concentrated,”¹⁴³ nor does it identify the competing fiber providers it claims are operating each route. In the absence of this detail, there is no way to verify Verizon’s representations or to substantiate its claims. Importantly, Verizon also fails to provide any information regarding which (if any) of these fiber networks in each wire center reach (and can support the offering of services within a commercially reasonable period of time to) individual customer locations. The extent to which competitive loop facilities have been constructed to individual buildings housing enterprise customers is an essential component to any forbearance analysis. In light of these myriad shortcomings, Verizon’s representations regarding competitive fiber deployment should be ignored.¹⁴⁴

As mentioned above, data regarding the ownership and operation of local transmission capacity along the individual routes and to the individual buildings needed to serve enterprise customers is critical to any analysis of whether section 251(c)(3) loop unbundling remains necessary to protect and promote competition in the enterprise market. Verizon fails to provide any analysis of this important factor. The Commenters, however, have obtained independent data regarding the number of Commercial Buildings¹⁴⁵ served by competitors over their own facilities in the six MSAs for which Verizon has requested forbearance. The data identifies all Commercial Buildings in all wire centers within the six MSAs and all buildings

¹⁴³ Verizon Petition – Boston, at 21.

¹⁴⁴ In its comments in response to Verizon’s Petitions, the Virginia State Corporation Commission questions the veracity of Verizon’s data regarding the existence of competitive fiber networks in Virginia. *See VCC Comments*, at 5.

¹⁴⁵ For purposes of this analysis, a Commercial Building is defined as any building that has at least one business tenant located at each building.

served by CLECs over their own facilities (also known as “Lit Buildings” since CLECs only deploy fiber)¹⁴⁶ in each wire center within each of the six MSAs.

The results are striking and significantly undermine Verizon’s claims of competition. The data shows that there is very little competition in any wire center for local loop transmission capabilities. These essential components to the provision of service to enterprise customers are highly concentrated with Verizon. Table 1 below lists the single wire center with the highest percentage of CLEC Lit Buildings in each of the six MSAs at issue. As shown for five of the six MSAs at issue, the highest percentage of CLEC Lit Buildings in any wire center is *less than 1.5%*. In only one MSA, Virginia Beach, does CLEC Lit Building penetration exceed that percentage, and in the Virginia Beach MSA the wire center with the highest penetration level is a mere 4.29%.

¹⁴⁶ A CLEC Lit Commercial Office Building is defined as any Commercial Building that has fiber-enabled network office equipment that has been placed there by one or more CLEC service providers, which generally indicates that a CLEC has deployed its own fiber or has a long-term lease of dark fiber to that building.

TABLE 1

| Wire Center in Each MSA With Highest % of CLEC Lit Buildings | Commercial Buildings | Commercial CLEC Lit Buildings | % Commercial CLEC Lit Buildings |
|---------------------------------------------------------------------|-----------------------------|--------------------------------------|----------------------------------------|
| Boston WLHMMawe | 1,007 | 15 | 1.49% |
| New York NYCMNYBS | 4,008 | 44 | 1.07% |
| Philadelphia PHLAPALO | 4,676 | 32 | 0.68% |
| Pittsburgh PITBPADT | 4,137 | 45 | 1.09% |
| Providence PRVDRIWA | 8,129 | 79 | 0.97% |
| Virginia Beach NRFLVABL | 1,654 | 71 | 4.29% |

Further, as illustrated in Table 2 below, the number of wire centers in each MSA in which there are no CLEC Lit Commercial Buildings is similarly dramatic. It shows a significant paucity of facilities-based competition for enterprise customers.

TABLE 2

| MSA | Number of Wire Centers | Number of Wire Centers With No CLEC Lit Fiber | % of Wire Centers With No CLEC Lit Fiber |
|----------------|-------------------------------|------------------------------------------------------|-------------------------------------------------|
| Boston | 131 | 69 | 53% |
| New York | 115 | 52 | 45% |
| Philadelphia | 156 | 78 | 50% |
| Pittsburgh | 149 | 114 | 77% |
| Providence | 33 | 11 | 33% |
| Virginia Beach | 58 | 16 | 28% |

At least one-third of all wire centers in five of the six MSAs have no CLEC lit fiber and in one MSA, Pittsburgh, nearly 80% of all wire centers have no CLEC lit fiber presence in any Commercial Buildings. Clearly, this data compels the Commission to reject Verizon's attempt to rely on alternative fiber networks in support of its request for forbearance.

5. Competitive Wholesale Service Offerings

Verizon makes only a cursory attempt to justify its forbearance requests for the mass market and the enterprise market on the basis of wholesale alternatives to the use of Verizon's section 251(c)(3) network elements.¹⁴⁷ Verizon cites the *Omaha Forbearance Order*

¹⁴⁷ See Verizon Petition – Boston, at 14-15, 23-24; Verizon Petition – New York, at 14-15, 25-26; Verizon Petition – Philadelphia, at 14-16, 25-26; Verizon Petition – Pittsburgh, at 14-15, 23-24; Verizon Petition – Providence, at 13-14, 22-23; Verizon Petition – Virginia Beach, at 13-15, 23. The Commenters also note that any effort by Verizon to argue that sufficient wholesale alternatives exist rings hollow in light of the fact that Verizon has been expediting the retirement of copper loop plant, which in the hands of competitive providers is used to offer viable alternatives to Verizon's retail services. Numerous competitors, including the Commenters, recently filed petitions for rulemaking with the Commission seeking to ensure that any retirement of copper plant is consistent with the

...Continued

as support for its position,¹⁴⁸ but fails to acknowledge that non-section 251(c)(3) wholesale offerings were irrelevant to the Commission's conclusions in that proceeding. In the *Omaha Forbearance Order*, the Commission firmly grounded its forbearance determinations on the existence of sufficient facilities-based competition by Cox in certain of Qwest's wire centers in the Omaha MSA.¹⁴⁹ Indeed, the Commission expressly concluded that "the record does not reflect any significant alternative sources of wholesale inputs for carriers in this geographic market."¹⁵⁰ While the Commission found "that Qwest's own wholesale offerings will continue to be adequate without unbundled loop and transport offerings,"¹⁵¹ this conclusion was not material to its decision to grant forbearance for certain wire centers in the Omaha MSA.¹⁵²

a. Mass Market

Verizon does not present any evidence of alternative sources of wholesale local services being offered by third parties to carriers that utilize Verizon's section 251(c)(3) network elements to serve mass market customers in the six MSAs at issue. Verizon merely represents

overall public interest. See *Petition of XO Communications, LLC, Covad Communications Group, Inc., NuVox Communications and Eschelon Telecom, Inc. for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops*, RM-11358 (filed Jan. 18, 2007); *In the Matter of Policies and Rules Governing Retirement of Copper Loops By Incumbent Local Exchange Carriers*, Petition for Rulemaking and Clarification, RM-11358 (filed Jan. 18, 2007).

¹⁴⁸ Verizon Petition – Boston, at 14; Verizon Petition – New York, at 14; Verizon Petition – Philadelphia, at 14; Verizon Petition – Pittsburgh, at 14; Verizon Petition – Providence, at 13; Verizon Petition – Virginia Beach, at 13.

¹⁴⁹ *Omaha Forbearance Order*, ¶ 64.

¹⁵⁰ *Id.*, ¶ 67.

¹⁵¹ *Id.*

¹⁵² In the more recent *Anchorage Forbearance Order*, the Commission likewise found the absence of "any significant alternative sources of wholesale inputs for carriers in the Anchorage study area," thus concluding that "continued access to [ACS's] loop facilities is important even in wire centers there already is extensive competition." *Anchorage Forbearance Order*, ¶ 30.

that it “has in fact made attractive wholesale offerings available even when it has no obligation to do so.”¹⁵³ Notably, however, one of the two wholesale services Verizon mentions is its offerings pursuant to the resale provisions of section 251(c)(4) of the Act.¹⁵⁴ Clearly, Verizon is under a statutory obligation to make those offerings available.¹⁵⁵ Verizon’s sole evidence regarding the “attractiveness” of these wholesale offerings consists of two figures from December 2005 regarding the number of voice-grade equivalent lines using each product.¹⁵⁶ This data – which is the sum and total of Verizon’s proof regarding wholesale competition in the mass market – is out of date. Further, it suffers from the same defect as all of the other data provided by Verizon to support its Petitions, *i.e.*, it is not wire center-specific, and therefore cannot be considered.¹⁵⁷

Putting aside the issue of lack of proof, Verizon’s attempt to ground a section 251(c)(3) forbearance determination for the mass market on the purported existence of “attractive” wholesale alternatives – whether offered by itself or a third party – is impermissible.

¹⁵³ Verizon Petition – Boston, at 14; Verizon Petition – New York, at 14, Verizon Petition – Philadelphia, at 14; Verizon Petition – Pittsburgh, at 14; Verizon Petition – Providence, at 14; Verizon Petition – Virginia Beach, at 14.

¹⁵⁴ Verizon Petition – Boston, at 14-15; Verizon Petition – New York, at 14-15; Verizon Petition – Philadelphia, at 14-16; Verizon Petition – Pittsburgh, at 14-15; Verizon Petition – Providence, 13-14; Verizon Petition – Virginia Beach, at 13-15.

¹⁵⁵ Notwithstanding this statutory obligation, Verizon recently notified its wholesale carrier customers that it proposes to assign their wholesale agreements to FairPoint Communications effective on the closing date of the pending transaction between the two carriers. A copy of Verizon’s notification letter is attached hereto as Exhibit 3.

¹⁵⁶ Verizon Petition – Boston, at 14-15; Verizon Petition – New York, at 14-15; Verizon Petition – Philadelphia, at 14-16; Verizon Petition – Pittsburgh, at 14-15; Verizon Petition – Providence, 13-14; Verizon Petition – Virginia Beach, at 13-15.

¹⁵⁷ Even if the lack of granularity were not a bar to consideration of the wholesale service data proffered by Verizon, the Commission should reject it as meaningless. Verizon merely provides the number of voice-grade equivalent residential lines using its Wholesale Advantage service and its section 251(c)(4) resale offerings as of December 2005. Verizon fails to provide any data which shows whether the number of lines utilizing each product is increasing or decreasing. As shown below, the level of mass market competition from carriers utilizing Verizon’s wholesale facilities and services is steadily decreasing.

In the *Triennial Review Remand Order* the Commission firmly established that the availability of wholesale alternatives should not foreclose unbundled access to a corresponding network element, even where a carrier could, in theory, use the wholesale alternative to enter a market.¹⁵⁸ In the words of the Commission: “It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs.”¹⁵⁹

Even if it were permissible to consider Verizon’s Wholesale Advantage service and its section 251(c)(4) resale offerings in determining whether the section 10(a) forbearance standard has been met by Verizon for the mass market, the relief Verizon requests must be denied. Notwithstanding Verizon’s blanket statements regarding the appeal of these options as alternatives to the use of Verizon’s section 251(c)(3) UNEs to serve mass market customers, the fact is that these wholesale services do not represent economically-viable alternatives for wireline carriers.

With the elimination in the *Triennial Review Remand Order* of their ability to obtain TELRIC-based local switching,¹⁶⁰ many competitive carriers were left with few viable alternative means to serve mass market customers. Those few carriers that could economically justify the deployment of a switch to serve mass market customers in particular locations – or to acquire another service provider with an existing switch – began to do so. Carriers without the financial means to self-provide switching, or the customer line density necessary for self-provided switching to be economically viable, stopped actively marketing their services to mass

¹⁵⁸ *Triennial Review Remand Order*, ¶ 48.

¹⁵⁹ *Id.*

¹⁶⁰ *See Triennial Review Remand Order*, ¶¶ 199-228.

market customers. By June 2006, the most recent date for which the Commission has made data available, ILECs were providing 22% fewer UNE loops with switching (*i.e.*, the type of service arrangement represented by Verizon's Wholesale Advantage product) than six months earlier.¹⁶¹ Resold lines also are declining.¹⁶² Overall, wireline competitive carriers are exiting the mass market. From June 2005 to June 2006, the number of residential lines served by CLECs declined by approximately 4 million (from 16.33 million to 12.37 million) and from December 2004 to June 2006 the decline was even more precipitous. During that 18-month period, CLEC residential lines dropped 7.4 million (from 19.81 million to 12.37 million).¹⁶³

Verizon, notwithstanding the fact that it carries the burden of proof, has provided no evidence that these nationwide numbers – and the alarming trend they represent – are not applicable to the specific markets for which it is requesting forbearance.¹⁶⁴ If these numbers truly are representative of the state of affairs within the six MSAs at issue here, and we maintain they are, Verizon's request for forbearance on the basis of the wholesale alternatives it has made available to wireline carriers serving the mass market must be denied.

¹⁶¹ *Local Telephone Competition: Status as of June 30, 2006*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, at Table 4 (Jan. 2007) ("*June 2006 Local Competition Report*").

¹⁶² *Id.*

¹⁶³ *June 2006 Local Competition Report*, Table 2.

¹⁶⁴ The only data relevant to this issue offered by Verizon is the number of voice grade equivalent ("VGE") residential lines, as of December 2005, competitors were serving throughout the MSA using Verizon's Wholesale Advantage product and the number of VGE residential lines, as of the same date, competitors were serving throughout the MSA using Verizon's section 251(c)(4) resold services. *See, e.g.*, Verizon Petition – Boston, at 14-15. This data, which is over a year old (and is not wire center-specific), does not permit any conclusions regarding trends. Further, importantly, Verizon's data for the Boston MSA shows that, as of December 2005, Verizon served nearly 20 times more VGE residential lines than its Wholesale Advantage competitors combined. As of the same date, Verizon served over 370 times more VGE residential lines than its competitors using Verizon's resold services. *Id.*, at n. 23.

Further, the recent experience of McLeodUSA in the Omaha MSA illustrates why the Commission should not take on faith Verizon's representations that its unappealing wholesale alternatives will remain available to wireline competitors.¹⁶⁵ McLeodUSA points out that the Commission in the *Omaha Forbearance Order* "made the predictive judgment that, notwithstanding forbearance from UNE obligations, Qwest would continue to make wholesale offerings of loops and transport [available] to its competitors."¹⁶⁶ McLeodUSA informs the Commission, however, that "Qwest continues to steadfastly refuse to negotiate any commercial or Section 271 pricing for the delisted high capacity UNEs for the affected central offices ("COs")."¹⁶⁷ The Commission should not presume that Verizon would behave any differently.

This is particularly true here, as Verizon does not have the same incentive as Qwest and ACS to make attractive wholesale offerings available to competitors in the absence of a section 251(c)(3) unbundling obligation. In Omaha and Anchorage, Qwest and ACS faced a single competitor with substantial market share and the significant ability to provide retail competition with its own facilities in the near term.¹⁶⁸ An ILEC in those circumstances clearly would prefer to have customers continue to be served in part through its wholesale facilities rather than via the competitor's network exclusively, which would provide the ILEC with no revenue.¹⁶⁹ Here, the circumstances are vastly different and even less favorable to ongoing wholesale competition. There are no competitors in any of the six Verizon MSAs at issue with the competitive leverage enjoyed by Cox in Omaha or GCI in Anchorage. Consequently, in the

¹⁶⁵ See Letter from Chris MacFarland, Group Vice President, McLeodUSA, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-281 (filed Dec. 15, 2006).

¹⁶⁶ *Id.*, at 1.

¹⁶⁷ *Id.*, at 2.

¹⁶⁸ *Omaha Forbearance Order*, ¶¶ 59-62; *Anchorage Forbearance Order*, ¶ 45.

¹⁶⁹ See *Anchorage Forbearance Order*, n. 145 (quoting ACS Nov. 30, 2006 Ex Parte Letter).

absence of a section 251(c)(3) unbundling requirement, there would be no corresponding market constraints on Verizon's wholesale pricing behavior.

b. Enterprise Market

Verizon contends that forbearance from section 251(c)(3) unbundling requirements is appropriate in the enterprise market because competitors in the six MSAs at issue are using Verizon's special access services to serve enterprise customers.¹⁷⁰ Verizon cites the *Omaha Forbearance Order* for the proposition that enterprise competition which relies on Verizon's wholesale inputs supports the conclusion that section 251(c)(3) obligations are no longer necessary to ensure that the prices and terms of its offerings are just and reasonable and not unreasonably discriminatory.¹⁷¹ Once again, Verizon misconstrues the *Omaha Forbearance Order*. There, the Commission took notice of the fact that "a number of carriers have had success competing for enterprise services using DS1 and DS3 special access channel terminations obtained from Qwest"¹⁷² and found that special access-based competition "supports our conclusion that section 251(c)(3) unbundling obligations are no longer necessary"¹⁷³ but, importantly, the Commission did not base its decision to grant Qwest limited forbearance on the existence of special access-based competition.¹⁷⁴

¹⁷⁰ See, e.g., Verizon Petition – Boston, at 24.

¹⁷¹ *Id.*, at 23 (citing *Omaha Forbearance Order*, ¶ 68).

¹⁷² *Omaha Forbearance Order*, ¶ 68.

¹⁷³ *Id.*

¹⁷⁴ Moreover, in the *Anchorage Forbearance Order*, GCI's reliance on ACS's wholesale services, including its special access circuits, compelled the Commission to order ACS to continue to provide access to its loop facilities throughout the Anchorage study area, including in wire centers where forbearance from section 251(c)(3) unbundling was granted. See *Anchorage Forbearance Order*, ¶ 38 ("we find that a continuing obligation of ACS to provide access to loops and subloops at commercially reasonable rates is necessary to justify the relief we grant ACS today . . .").

There are several important reasons why the Commission should not take into account special access-based competition here. First, the paltry data Verizon offers regarding enterprise competition using special access is not geographic market-specific. Verizon's special access data suffers from the same fatal defect as all of the other data proffered by Verizon, *i.e.*, it is provided on an MSA-wide, not wire center-specific, basis.¹⁷⁵ Second, Verizon has produced no evidence that any carrier relying on its special access service is competing successfully in the local exchange market in any wire center. As pointed out by the Commission in the *Triennial Review Order*, "a carrier's use of tariffed incumbent LEC offerings does not conclusively demonstrate that it is doing so successfully, or should continue to do so."¹⁷⁶ Third, there is significant record evidence in the Commission's *Special Access Reform Proceeding*¹⁷⁷ and elsewhere¹⁷⁸ that Phase I and Phase II incumbent LEC pricing flexibility for special access services has resulted in higher special access prices and that reform of special access pricing rules is in order. Therefore, absent meaningful special access reform, it cannot be concluded that Verizon's pricing behavior would be disciplined if section 251(c)(3) forbearance is granted.

Finally, while it makes no reference in its Petitions to alternative wholesale sources of supply for carriers serving the enterprise market, the Lew/Verses/Garzillo Declaration accompanying five of Verizon's six Petitions mentions "a class of carriers that offer mainly

¹⁷⁵ See Verizon Petition – Boston, at 24; Verizon Petition – New York, at 25; Verizon Petition – Philadelphia, at 25-26; Verizon Petition – Pittsburgh, at 23; Verizon Petition – Providence, at 23; Verizon Petition – Virginia Beach, at 23.

¹⁷⁶ *Triennial Review Order*, ¶ 64.

¹⁷⁷ *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005) ("*Special Access NPRM*").

¹⁷⁸ See Section VI, *infra*.

wholesale services to other telecommunications carriers.”¹⁷⁹ A list of companies, ranging in number from a single entity to four companies, are included for the Boston, New York, Philadelphia, Pittsburgh, and Providence MSAs, but no further detail is provided.¹⁸⁰ These unsupported statements are hardly probative of the nature and extent (if any) of wholesale alternatives to Verizon’s special access service for carriers serving the enterprise market in those five MSAs. Consequently, this “evidence” should be ignored by the Commission.

The lack of wholesale alternatives to Verizon’s special access services has been acknowledged by the VCC in comments in this docket.¹⁸¹ The VCC pointed out that its concerns regarding the potential impact on the wholesale special access market as a result of the merger of Verizon and MCI had led it to adopt certain conditions intended to protect competition and the VCC urged the Commission to refrain from granting Verizon any additional relief related to the wholesale special access market “until it is convinced [those] conditions,” and the similar conditions adopted by the Commission, “have proved effective.”¹⁸² Similarly, the lack of appreciable competition to Verizon in the special access market was acknowledged by the Commission itself in the *Verizon-MCI Merger Order*.¹⁸³ There, the Commission found that MCI provided special access service in competition with Verizon’s special access services and that the

¹⁷⁹ *Lew/Verses/Garzillo Decl. – Boston*, ¶ 61; *Lew/Verses/Garzillo Decl. – New York*, ¶ 68; *Lew/Verses/Garzillo Decl. – Philadelphia*, ¶ 65; *Lew/Verses/Garzillo Decl. – Pittsburgh*, ¶ 54; *Lew/Verses/Garzillo Decl. – Providence*, ¶ 52. No mention of alternative wholesale suppliers is made in the Verizon Petition for the Virginia Beach MSA.

¹⁸⁰ *Lew/Verses/Garzillo Decl. – Boston*, ¶ 61 (listing four carriers); *Lew/Verses/Garzillo Decl. – New York*, ¶ 68 (listing four carriers); *Lew/Verses/Garzillo Decl. – Philadelphia*, ¶ 65 (listing three carriers); *Lew/Verses/Garzillo Decl. – Pittsburgh*, ¶ 54 (listing one carrier); *Lew/Verses/Garzillo Decl. – Providence*, ¶ 52 (listing two carriers).

¹⁸¹ *See VCC Comments*, at 4.

¹⁸² *Id.*

¹⁸³ *Verizon-MCI Merger Order*, ¶ 24. The same conclusion was reached by the NYS Staff in its Verizon-MCI merger proceeding. *See NYS Staff White Paper*, at 40-46.

merger of those two firms “absent appropriate remedies”¹⁸⁴ was “likely to have an anticompetitive effect on the market for Type I wholesale special access services.”¹⁸⁵ The Commission expressly conditioned merger approval on the divestiture of certain facilities and the acceptance of certain voluntary commitments relating to prices for special access services.¹⁸⁶ As suggested by the VCC,¹⁸⁷ the Commission should not award Verizon any additional regulatory relief until the merger conditions have lapsed and it is otherwise clear that Verizon has an ongoing intention to provide attractive wholesale service options.

Indeed, granting Verizon forbearance from the unbundling obligations of section 251(c)(3) would render the Verizon-MCI merger requirement that Verizon not seek any increase in state-approved rates for UNEs in effect as of the approval date of the merger a nullity.¹⁸⁸ Obviously, the prohibition against such rate increases for section 251(c)(3) UNEs would be meaningless if those UNEs no longer existed. The Commission could not have intended for Verizon to be able to completely circumvent this merger condition by obtaining forbearance during the two-year period the condition is in effect. Consequently, any requests by Verizon for forbearance from section 251(c)(3) unbundling obligations should not be entertained until after that merger condition expires.¹⁸⁹

¹⁸⁴ *Verizon-MCI Merger Order*, ¶ 24.

¹⁸⁵ *Id.*, ¶ 3.

¹⁸⁶ *Id.*, ¶ 24.

¹⁸⁷ *VCC Comments*, at 4.

¹⁸⁸ *See Verizon-MCI Merger Order*, App. G, Unbundled Network Elements, ¶ 1.

¹⁸⁹ The 12-month statutory deadline for action on Verizon’s pending forbearance requests will occur well before the two-year federal merger condition prohibiting Verizon from seeking increases in state-approved rates for UNEs will expire.

V. VERIZON HAS NOT SHOWN IT IS ENTITLED TO RELIEF FROM DOMINANT CARRIER OR COMPUTER III REQUIREMENTS

In addition to its request for forbearance from section 251(c)(3) unbundling obligations, Verizon requests relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements arising under section 214 of the Act and Part 63 of the Commission's rules, and the Commission's Computer III rules, including CEI and ONA requirements.¹⁹⁰ Again, Verizon has failed to demonstrate that continued enforcement of these requirements is not necessary to ensure that its charges and practices are just and reasonable and not unreasonably discriminatory, and that enforcement is not necessary for the protection of consumers.

As noted by the Commission in the *Omaha Forbearance Order*, forbearance from dominant carrier regulation is justified only if the state of competition is such that the interests of consumers and competition would be protected in the absence of the regulations at issue.¹⁹¹ In the Omaha forbearance proceeding, the Commission noted that dominant carrier regulations initially were imposed on ILECs, including Qwest, as a result of a Commission determination that those carriers "have market power in the provision of most services within their service area."¹⁹² Consequently, forbearance from dominant carrier regulation must be preceded by a finding that the ILEC seeking forbearance no longer has market power in the provision of the services for which it seeks forbearance.¹⁹³

¹⁹⁰ See n. 3, *infra*.

¹⁹¹ *Omaha Forbearance Order*, ¶ 19.

¹⁹² *Id.*, ¶ 11. The Commission defines market power as the "ability to raise prices by restricting output" or "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *Id.*, n. 54.

¹⁹³ *Id.*, ¶ 22.

Market share, supply and demand elasticities, and the firm's cost, structure, size, and resources are all relevant to the Commission's analysis of whether the ILEC seeking freedom from dominant carrier regulation retains market power.¹⁹⁴ In granting Qwest forbearance from certain dominant carrier regulations with respect to its mass market exchange access services and its mass market broadband Internet access services in the *Omaha Forbearance Order*, the Commission found that each of these economic factors justified regulatory relief.¹⁹⁵

Here, Verizon has failed to provide any data to evaluate these factors. Indeed, Verizon fails to address these factors at all in its Petitions. In the absence of any market-specific information that may be used to evaluate Verizon's market share, as well as the other economic factors relevant to an analysis of whether dominant carrier regulation is necessary to protect consumers and competition, the Commission should conclude that Verizon has failed to meet its burden of proof and Verizon's request for forbearance from dominant carrier rules should be denied.

Similarly, Verizon has failed to meet its burden of proof that forbearance from the Computer III requirements is justified. The only mention Verizon makes of Computer III in its Petitions is in the introductory footnote where Verizon identifies with specificity the statutory and regulatory provisions from which it seeks forbearance.¹⁹⁶ Verizon makes absolutely no effort whatsoever to explain how or why forbearance from Computer III requirements would be consistent with the public interest or how or why enforcement of those requirements is not necessary either to ensure that Verizon's rates, terms and conditions of service are just,

¹⁹⁴ *Id.*, ¶ 31.

¹⁹⁵ *Id.*, ¶¶ 39-43.

¹⁹⁶ *See, e.g.*, Verizon Petition – Boston, at n. 3.

reasonable and nondiscriminatory or to protect consumers. Denial of Verizon's request for forbearance from the Commission's Computer III rules therefore must follow.

VI. SECTION 271 IS NOT A SUFFICIENT BACKSTOP TO DEVELOP AND PRESERVE COMPETITION IF FORBEARANCE IS GRANTED

Although the Commission in the *Omaha Forbearance Order* granted Qwest's request for forbearance from the obligations of section 251(c)(3), the Commission did so only while declining to forbear from similar requirements under the competitive checklist contained in section 271(c)(2)(B)(iv) through (vi) of the Act.¹⁹⁷ The Commission reiterated that "checklist items 4 through 6 establish independent and ongoing obligations for BOCs to provide wholesale access to loops, transport and switching, irrespective of any impairment analysis under section 251 . . ."¹⁹⁸ and that "Qwest has not shown that checklist items 4 through 6 are unnecessary to ensure that Qwest's charges and practices are just and reasonable and not unreasonably discriminatory . . ."¹⁹⁹ Indeed, the Commission's willingness to grant Qwest relief from the unbundling obligations of section 251(c)(3) was grounded significantly on the ongoing applicability of section 271's network element requirements.²⁰⁰

Similarly, the Commission's decision to grant ACS relief from its section 251(c)(3) unbundling obligations in certain wire centers in Anchorage was conditioned on the continued availability of loop access.²⁰¹ Noting that because ACS is not a BOC, and therefore

¹⁹⁷ *Omaha Forbearance Order*, ¶ 100.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*, ¶ 64 ("We also rely on the continued operation of other provisions of the Act designed to develop and preserve competitive local markets, including particularly the other obligations arising under sections 251(c) and 271(c) that apply to Qwest from which we do not forbear today."). *See also id.*, ¶ 62.

²⁰¹ *Anchorage Forbearance Order*, ¶¶ 39-40.

is not subject to the requirements of section 271, the Commission conditioned its grant of forbearance on an obligation that “mirrors the section 271 checklist obligation the Act imposes on BOCs that have obtained section 271 approval . . .”²⁰² Specifically, the Commission compelled ACS to continue to provide legacy loop access at just and reasonable and not unreasonably discriminatory rates upon expiration of the one year transition period adopted by the Commission.²⁰³ The Commission imposed this condition as a “prerequisite to [its] grant of forbearance relief,” concluding that “absent this condition . . . [it] would not be able to conclude that the criteria of section 10 are met.”²⁰⁴

The evidence is quite clear, however, that section 271(c)’s competitive checklist obligations cannot be relied on to discipline Verizon’s behavior. As early as the *Triennial Review* proceeding, Verizon attempted to convince the Commission that section 271 does not establish a separate BOC access obligation for network elements no longer required to be unbundled under section 251(c)(3) and that “once the Commission has determined that a network element is not necessary under section 251(d)(2), the corresponding checklist item should be construed as being satisfied.”²⁰⁵ And Verizon’s conduct since the *Triennial Review Remand Order* eliminated the section 251(c)(3) requirement that certain network elements be unbundled and made available at TELRIC rates²⁰⁶ should not be ignored.

²⁰² *Id.*, ¶ 41.

²⁰³ The Commission mandated use of the rates for DS0 and DS1 loops currently in effect in Fairbanks, Alaska until such time as alternative rates are agreed to by ACS and GCI. *Id.*, ¶ 39.

²⁰⁴ *Id.*, ¶ 40.

²⁰⁵ *Triennial Review Order*, ¶ 652.

²⁰⁶ *See, e.g., Triennial Review Remand Order*, ¶ 199.

For example, notwithstanding its commitments to the state commissions in Maine and New Hampshire that it would file and maintain a wholesale tariff covering its competitive checklist obligations under section 271(c)(2)(B) of the Act, Verizon has chosen to file suit against each commission, charging that it should not have to adhere to the tariffing requirement.²⁰⁷ Verizon's actions in Maine and New Hampshire are consistent with its general position that the commercial negotiation process is the proper vehicle to be employed to arrive at rates and terms for section 271 network elements and that the parties (*i.e.*, Verizon and the competitive carrier customer) should be free to contract without oversight or approval by regulators.²⁰⁸

The legal questions surrounding whether state and/or federal regulators have the authority to set rates and terms for section 271 checklist elements, or whether these matters will be left to the private negotiation process, is currently being litigated in multiple jurisdictions²⁰⁹

²⁰⁷ See *New Hampshire Public Utilities Commission v. Verizon New England, Inc.*, Appeal No. 06-2429 (1st Cir.); *Verizon New England Inc. v. Maine Public Utilities Commission*, Appeal No. 06-2151 (1st Cir.).

²⁰⁸ See, *e.g.*, *Petition of Verizon New England Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order*, D.T.E. 04-33, Initial Brief of Verizon Massachusetts, Inc. (filed Apr. 5, 2005), at 130. Further, as explained in n. 155, Verizon plans to transfer its negotiated agreements to FairPoint upon completion of the pending transaction between the two parties.

²⁰⁹ See, *e.g.*, *BellSouth Emergency Petition for the Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed Jun. 24, 2004); *Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*, WC Docket No. 06-90 (filed Apr. 18, 2006); *Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), appeal pending, *Qwest Corp. v. Ariz. Corp. Comm'n*, No. 2:06-CV-01030-ROS (D. Ariz.) (filed Apr. 13, 2006); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, *Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271*, 2006 Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and *Order Setting Rates Under Section 271*, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006),

...Continued

and the BOCs – including Verizon – are taking advantage of the current unsettled environment by refusing to honor their statutory obligation to make checklist elements available at just and reasonable, and not unreasonably discriminatory, rates and terms. Consequently, until the law becomes settled, the bare existence of an ongoing obligation under section 271 to make loops, transport and switching available cannot be relied upon to police Verizon’s behavior and to ensure that competitors are afforded competitively-viable access to the facilities they need to provide service to consumers.

Verizon’s position would not be so problematic if the commercial negotiation process could be relied upon to result in rates and terms for section 271(c) checklist items that further Congress’ and the Commission’s goal “to develop and preserve competitive local markets.”²¹⁰ But that is not the case. Verizon’s response to carriers that must replace Verizon’s section 251(c)(3) loop and transport elements in wire centers and on routes that have been de-listed is not to enter into an arms-length, good faith negotiation process. Instead, Verizon merely

appeal pending, *BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm’n et al.*, No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm’n*, No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24, 2006); *BellSouth Telecommunications, Inc.’s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), Order, 2006 Ky. PUC LEXIS 680 (Ky. P.S.C. Aug. 16, 2006), appeal pending, *BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm’n et al.*, 3:06-CV-00065-KKC (E.D. Ky.) (filed Sep. 12, 2006); *Southwestern Bell Telephone L.P. d/b/a SBC Missouri’s Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, Arbitration Order, 2005 Mo. PUC LEXIS 963 (Mo. P.S.C. Jul. 11, 2005), rev’d in part, *Southwestern Bell Tel. L.P. d/b/a SBC Missouri v. Missouri Pub. Serv. Comm’n et al.*, 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. 2006), appeal pending, *Southwestern Bell Tel. d/b/a SBC Missouri v. Big River Tel. Co., LLC et al.*, Nos. 06-3701 and 06-3726 (consolidated) (8th Cir.) (filed Oct. 26, 2006).

²¹⁰ *Omaha Forbearance Order*, ¶ 64.

provides competitors with a “take-it-or-leave-it” choice among its special access offerings.²¹¹

Regretfully, Verizon’s special access offerings fall far short of the mark.

In mid-2005, in response to the Commission’s request for input on potential modifications to its special access regulatory regime,²¹² numerous parties urged the Commission to adopt reforms that would more adequately protect the public interest.²¹³ Those commenters pointed out that the BOCs, including Verizon, retain market power in the provision of special access services and are abusing that market power with unjust and unreasonable rates and terms.²¹⁴ Notwithstanding widespread support for special access pricing reform, to date the Commission has not acted in this docket. The recent issuance of a comprehensive report by the U.S. Government Accountability Office (“GAO”)²¹⁵ has intensified the call for action by the Commission. The GAO Report on special access found extremely low levels of facilities-based competition to customer locations in areas where the Commission has granted special access pricing flexibility, and that prices for special access have risen in areas where Phase II pricing flexibility has been granted.²¹⁶ These findings are consistent with Verizon’s behavior in the marketplace, as evidenced in part by Verizon’s recent introduction of a special access pricing

²¹¹ As predicted by the NYS Staff, Verizon’s superior bargaining position and its unwillingness to engage in good faith negotiations with smaller carriers have increased since its merger with MCI. *See NYS Staff White Paper*, at 44.

²¹² *See Special Access NPRM*.

²¹³ *See, e.g.*, Comments of XO Communications, Inc., WC Docket No. 05-25 (filed Jun. 13, 2005).

²¹⁴ *Id.*, at 4.

²¹⁵ *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report to the Chairman, Committee on Government Reform, U.S. House of Representatives, General Accounting Office, GAO-07-80 (Nov. 2006) (“GAO Report”).

²¹⁶ *GEO Report*, at 9.

plan that would raise carrier customers' rates significantly while locking them into a multi-year contractual arrangement.

More specifically, on October 6, 2006, Verizon filed amendments to its Tariff F.C.C. Nos. 1 and 11 to introduce a new Contract Tariff Option ("New Option").²¹⁷ The New Option is an offering exclusively for wholesale customers who commit to convert their DS1 and DS3 unbundled network elements to special access services purchased under Tariff F.C.C. Nos. 1 and 11. Customers subscribing to the New Option receive discounted monthly recurring rates on their DS1 and DS3 special access services. To be eligible to subscribe to the New Option, however, a customer must purchase UNEs in at least three Qualified MSAs²¹⁸ and must elect to include 100% of its UNEs in either 100% of its Qualified MSAs or 80% of its Qualified MSAs. Customers are not permitted to disconnect, move, or rearrange eligible special access service circuits,²¹⁹ and any circuits converted back to UNEs would incur termination penalties.²²⁰ Further, New Option customers are prohibited from subscribing to any additional contract tariff option or specialized service arrangement unless explicitly permitted to do so.²²¹

In presentations to its carrier customers, Verizon highlights the elimination of the uncertainty of continuing to operate in the current UNE environment as a particular benefit of the New Option and suggests that carriers should embrace the New Option as "insurance" against the disappearance of UNEs through the regulatory forbearance process. Verizon's "insurance"

²¹⁷ Verizon Telephone Companies, Transmittal No. 746 (filed Oct. 6, 2006).

²¹⁸ A Qualified MSA is an MSA "where the customer purchases one (1) or more of the Eligible UNEs . . . from the Telephone Company." Tariff F.C.C. No. 1, Section 21.45(B)(2), Verizon Telephone Companies, Transmittal No. 746 (Oct. 6, 2006).

²¹⁹ Grooming for the purpose of changing the amount of applicable channel mileage is permitted. *See* Tariff F.C.C. No. 1, Section 21.45(F)(4)(c).

²²⁰ *See* Tariff F.C.C. No. 1, Section 21.45(F)(4)(d).

²²¹ *See* Tariff F.C.C. No. 1, Section 21.45(H)(1)(a).

comes at a heavy price however. One of the Commenters was provided by Verizon with an analysis of the financial impact of the New Option that showed a cost increase of approximately \$250,000 a month, or \$3 million annually, as a result of converting its DS1 and DS3 UNEs to the New Option. The “attractiveness” of such an alternative is highly debatable.

In light of Verizon’s marketplace behavior, in order to justify forbearance from section 251(c)(3) unbundling requirements, it is not enough for the Commission to passively note Verizon’s ongoing statutory obligations under section 271(c)(2)(B). The Commission must find that Verizon has produced evidence that it is consistently meeting its section 271(c)(2)(B) obligations (and is acting consistently with the requirements of section 10(a)) through the offering of rates and terms for loops and transport that are just and reasonable and not unreasonably discriminatory. Verizon cannot sustain its burden that its treatment of special access meets its obligations under items 4 and 5 of the section 271(c)(2)(B) competitive checklist and would provide a sufficient backstop to protect consumers and competition if section 251(c)(3) unbundling of loops and transport were to be granted by the Commission. Consequently, Verizon’s requested section 251(c)(3) forbearance relief should be denied.

VII. A GRANT OF FORBEARANCE WOULD NOT BE IN THE PUBLIC INTEREST

Beyond Verizon’s failure to demonstrate that ongoing section 251(c)(3) unbundling and dominant carrier regulations are not necessary to ensure that its charges and practices are just and reasonable and likewise are unnecessary for the protection of consumers, as discussed above, it is clear that the Verizon Petitions are not consistent with the public interest, and therefore do not satisfy the third prong of the section 10(a) test. There are several reasons compelling the conclusion that the grant of forbearance to Verizon in the six MSAs at issue would run counter to the public interest. And it is not an exaggeration to suggest that granting

forbearance would have significant deleterious public interest impacts that would extend far beyond the six MSAs under consideration here.

A. Competition Would Be Diminished If Forbearance Is Granted

In the *Omaha Forbearance Order*, the Commission analyzed the third prong of the section 10(a) test (*i.e.*, whether forbearance from the unbundling obligations of section 251(c)(3) would be in the public interest) largely on the basis of the actual competition which existed within the wire centers of the Omaha MSA. The Commission noted that the factors upon which it based its conclusions regarding satisfaction of the first two prongs of the section 10(a) standard “also convince us that granting Qwest forbearance from the section 251(c)(3) access obligation for loop and transport elements would be consistent with the public interest under section 10(a)(3).”²²² The principal factor guiding the Commission in the Omaha case, of course, was evidence of sufficient facilities-based competition in the particular wire centers in which forbearance was granted. Likewise, in the *Anchorage Forbearance Order*, the Commission based its grant of forbearance on the fact that “ACS is subject to a significant amount of competition in the Anchorage study area.”²²³

As discussed above, Verizon has not demonstrated sufficient competition from cable companies, wireless service providers, O/VoIP providers, alternate transport providers, or other sources in any of the subject MSAs on a wire center-specific basis. Accordingly, not only has Verizon failed to meet the first two prongs of the section 10(a) standard, it has failed to satisfy the public interest standard under section 10(a)(3).

²²² *Omaha Forbearance Order*, ¶ 75.

²²³ *Anchorage Forbearance Order*, ¶ 49.

In the *Omaha Forbearance Order*, the Commission also found that the costs of continued section 251(c)(3) unbundling outweighed the benefits;²²⁴ something which Verizon claims is true generally in each of the six MSAs that are the subject of its Petitions.²²⁵ The Commission concluded that the “costs [of unbundling] are unwarranted and do not serve the public interest once local exchange and access markets are sufficiently competitive, as is the case in certain limited areas of the Omaha MSA.”²²⁶ Here, because Verizon has failed to demonstrate, in any of the six metropolitan areas that are the subject of its Petitions, sufficient competition in any relevant geographic market, *i.e.*, wire center, the Commission has no basis to conclude, even “in certain limited areas of the [subject] MSA[s],” that the costs of unbundling outweigh the benefits.

More particularly, Verizon offers no evidence in its Petitions that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout the six MSAs.²²⁷ Indeed, the evidence is compelling that competitive conditions in these MSAs are such that

²²⁴ *Omaha Forbearance Order*, ¶¶ 76-77.

²²⁵ See Verizon Petition - New York, at 26-27; Verizon Petition - Philadelphia, at 27; Verizon Petition - Pittsburgh, at 25; Verizon Petition - Providence, at 25; Verizon Petition - Virginia Beach, at 25; Verizon Petition - Boston, at 25-26.

²²⁶ *Omaha Forbearance Order* ¶ 77.

²²⁷ Verizon claims that the unbundling requirements in the subject MSAs are “excessive.” See, *e.g.*, Verizon Petition - New York, at 25. Because Verizon has failed to meet its burden to demonstrate sufficient competition in any particular wire centers in any of the six MSAs, it has no foundation for this assertion. As a result of this failure, any assertion that its unbundling obligations are “excessive” reduces to the untenable assertion that *any* of its unbundling obligations are excessive, a conclusion which is totally at odds “with Congress’s clear intent in section 10 to sunset *in a narrowly tailored fashion* any regulatory requirements that are no longer necessary in the public interest so long as consumer interests and competition are protected.” See *Omaha Forbearance Order*, ¶ 40 (emphasis supplied).

continued unbundling is required because market forces alone cannot be relied upon to sustain competition.

Verizon relies in part on the competition provided by “traditional CLECs” to support its requested relief in both the mass market and the enterprise market.²²⁸ Yet these competitors in the Verizon incumbent local operating territory – including the Commenters – continue to rely overwhelmingly on Verizon-provided unbundled loop and transport UNEs to serve their hundreds of thousands of customers located throughout the Verizon footprint. As discussed in detail in Section IV.B, these service providers have no practical alternatives to use of Verizon’s wholesale network facilities, particularly Verizon’s last mile capabilities, to reach consumers. If the current regulatory obligation on Verizon to make these wholesale inputs available to competitors on cost-based (*i.e.*, TELRIC) rates and terms were to disappear through forbearance, it is difficult to see how consumers and competition would benefit. Indeed, the result would quite likely be the opposite; wholesale rates for loops and transport would rise, driving some competitors out of the market entirely and forcing the remaining carriers to raise rates and limit service options.

The stark nature of the options Verizon has presented to carrier customers shows the strength of Verizon’s market power in the DS1 and DS3 UNE markets. If carrier customers enjoyed any real alternatives to Verizon’s DS1 and DS3 offerings – either through self-supply or alternative wholesale service arrangements – Verizon could not offer a special access product guaranteed to significantly increase carriers’ costs and expect to be taken seriously. In a

²²⁸ See, *e.g.*, Verizon Petition - Boston, at 4 (“Traditional CLECs, including carriers that obtain wholesale service from Verizon provide an additional layer of competition.”), and at 22 (“[I]n addition to the cable companies, a large number of other competitors provide extensive retail competition in the Boston MSA. Such competitors include traditional telecom carriers such as AT&T, Level 3, Sprint, Global Crossing, PAETEC, Broadwing and One Communications . . .”).

competitive market, a service provider must offer its products at price levels that attract customers. An offering like Verizon's New Option,²²⁹ which would necessarily substantially increase a potential customer's costs – and lock the customer in to higher rates for the entire multi-year term of the service arrangement – would never make it to market. Likewise, no carrier with practical alternatives would spend more than a moment considering Verizon's New Option before rejecting it. Verizon's New Option only exists because in the current competitive environment carriers are compelled to rely on Verizon's facilities and services to reach consumers. In such an environment, one can expect that Verizon's DS1 and DS3 prices would be even higher in the absence of regulatory compulsion to offer DS1 and DS3 loops and transport at cost-based rates. This is compelling evidence that competitive conditions in the Verizon operating territory are such that market forces alone cannot be relied upon to sustain competition.

Verizon also contends that “eliminating unbundling regulation will ‘further the public interest by increasing regulatory parity’ between telecommunications providers” in the subject MSAs.²³⁰ Verizon argues that because it is losing customers to intermodal competitors, it would be in the public interest to end allegedly unequal regulation between the different technological modes of delivery. In the *Omaha Forbearance Order*, however, the Commission made clear that the impetus to create technological parity is warranted only “[o]nce the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities.”²³¹ As shown herein, there is not yet sufficient actual competition from wireless, cable, O/VoIP, or other service providers in any wire

²²⁹ Verizon's New Option is discussed in Section VI.

²³⁰ See, e.g., Verizon Petition – New York, at 27 (quoting *Omaha Forbearance Order*, ¶ 78).

²³¹ *Omaha Forbearance Order*, at ¶ 78.

center in any of the six MSAs that are the subject of Verizon's Petitions. Steps taken to establish technological parity cannot precede the emergence of sufficient competition but, instead, must effectively derive from it. Given the state of the market in the six MSAs at issue and Verizon's failure to meet its burden of proof, establishing technological parity at this time in any of the wire centers in any of the six MSAs would be unwarranted, premature, and certainly *not* in the public interest.²³²

As a further reason why forbearance from section 251(c)(3) unbundling would not be in the public interest, the Commission only slightly more than a year ago approved Verizon's merger with MCI in part because of continuing obligations the merged entity would have to unbundle loop and transport network elements.²³³ Removing those unbundling obligations so soon thereafter, especially in light of Verizon's failure to make a showing of sufficient competition, would be contrary to sound public policy.²³⁴ Before the Commission could seriously entertain the thought of removing these unbundling obligations, Verizon would be required to make a much more compelling and detailed showing than it has.

In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance "will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of

²³² Notably, Verizon fails to make the argument, relied upon by the Commission in the *Omaha Forbearance Order*, that forbearance would motivate Qwest to compete vigorously on both a retail and a wholesale basis. See *Omaha Forbearance Order*, ¶¶ 79-81.

²³³ *Verizon-MCI Order*, ¶¶ 33, 51, n. 130.

²³⁴ Indeed, as discussed in Section IV.B, one of Verizon's post-merger commitments and a condition of the Commission's merger approval was that Verizon would not raise section 251(c)(3) UNE rates for two years. *Verizon-MCI Order*, App. G, Unbundled Network Elements, ¶ 1. Were the Commission to grant forbearance and thereby eliminate the obligation to provide section 251(c)(3) UNEs before the two years has expired, the merger commitment would be rendered nugatory.

telecommunications services.”²³⁵ A finding that forbearance will promote competition could form the basis for a conclusion that forbearance is in the public interest. At the same time, however, a mere finding that forbearance would not be detrimental to the public is not enough. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial competitive *benefits* would arise from forbearance. Verizon has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.²³⁶

B. Consumers Would Be Harmed If Forbearance Is Granted

Even if the Commission concludes that the needs of individual competitors do not present a compelling basis upon which to resolve Verizon’s Petitions (and the Commenters do not suggest that this is the case), section 10(a)(3) compels the Commission to give great weight to the interests of *telecommunications consumers* in the MSAs at issue. Careful consideration of the current state of competition in the six MSAs at issue leads inexorably to the conclusion that consumers in Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach would suffer significant harm should forbearance be granted.²³⁷

²³⁵ 47 U.S.C. § 160 (b).

²³⁶ A similar analysis of detrimental effects versus competitive benefits was recently undertaken by the Commonwealth Court of Pennsylvania in the context of the Verizon-MCI merger. There, the Court, addressing the Pennsylvania Public Utility Commission’s (“PA PUC”) decision to refrain from adopting any Pennsylvania-specific conditions on its approval of the merger between Verizon and MCI, held that the PA PUC erred in its failure to “either reject the merger or impose conditions that will benefit the public in a substantial way.” *Irwin A. Popowsky v. Pennsylvania Public Utility Commission*, Opinion (Commonwealth Ct of PA, Feb. 20, 2007), Slip Op. at 29. The Court pointed out that the Pennsylvania Public Utility Code requires that proponents of a merger demonstrate that the merger will affirmatively promote the public interest in some substantial way, not merely that the merger would not have an adverse effect on the public. *Id.*, at 22. The Court remanded the proceeding to the PA PUC to perform the required analysis.

²³⁷ Importantly, the Virginia State Corporation Commission has expressed its concern that granting Verizon forbearance from unbundling requirements in the Virginia Beach MSA

... *Continued*

As discussed above, competitive carriers continue to rely on Verizon's loops and transport facilities to reach their customers. Continued access to Verizon's loops and transport under section 251(c)(3) at TELRIC rates is critically important to carriers serving either the mass market or the enterprise market within the six MSAs at issue. Unfortunately, widespread wholesale alternatives to use of Verizon's facilities and services do not presently exist, nor are they on the horizon, and complete self-supply generally is not practically or economically feasible. The ability to use Verizon's network at cost-based rates remains absolutely essential to ensure that consumers of competitive carriers continue to enjoy the value-added competitive services they currently enjoy today and to take advantage of the competitive innovations of tomorrow.

For example, Covad Communications purchases DS0 UNE loops from Verizon and uses them in conjunction with its own next-generation ADSL2+ facilities to offer a Line Powered Voice ("LPV") product which provides customers value-added bundles of local and long distance voice and high-speed Internet access with speeds of up to 25 mbps for a single monthly fee. EarthLink currently uses LPV to make its "DSL & Home Phone" service available in 11 major cities, including Philadelphia and New York.²³⁸ Covad expects to make similar LPV service offerings available to other wholesale partners for residential and/or business use and

could have a deleterious effect on consumers and competition. *See VCC Comments*, at 3 ("We are concerned that granting Verizon's petition may result in reducing the choices that consumers already have in the telecommunications marketplace in the Virginia Beach MSA.").

²³⁸ EarthLink's DSL & Home Phone service offers residential consumers three bundles of voice and DSL services with differing voice usage amounts, premium calling features, and broadband speeds at \$49.95 to \$69.95 per month. *See* <http://www.earthlink.net/voice/bundles/dslhomephone/>.

directly to its own business customers in the future.²³⁹ Similarly, XO uses DS0 loops in association with Ethernet over copper technologies deployed in XO's network to enable the provision of broadband services at multi-megabit per second speeds not thought possible only a few years ago. In addition, technologies available today can support numerous simultaneous streams of high-definition video, becoming a formidable competitive alternative to the hybrid fiber-coax ("HFC") plant of cable providers and the FTTH/FTTC/fiber-to-the-node plant of the incumbent LECs. Absent DS0 UNE loops, these innovative competitive service offerings would likely not be available to consumers at all.

Because competitive carriers remain reliant on access to Verizon's loop and transport UNEs, the grant to Verizon of forbearance from UNE unbundling obligations (including TELRIC pricing) would force competitive carriers to raise prices, narrow their service offerings, and curtail the introduction of innovative products and services. Thus, millions of consumers in the six MSAs at issue soon would be faced with less carrier and service choices and, perhaps most importantly, higher prices.

²³⁹ See Covad Completes Build-Out of Nation's Largest Next Generation Telecommunications Network Ahead of Schedule (Dec. 27, 2006) *available at* http://www.covad.com/companyinfo/pressroom/pr_2006/12_27_06.pdf.

VIII. CONCLUSION

For all of the forgoing reasons, Verizon's Petitions should be dismissed. If the Commission declines to dismiss the Petitions, it must deny Verizon the regulatory relief it seeks on the ground that Verizon has not met the statutory prerequisites for forbearance contained in section 10 of the Act.

Respectfully submitted,

**BROADVIEW NETWORKS, INC.
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March 5, 2007

EXHIBIT 1

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|-----------------------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Petitions of the Verizon Telephone Companies |) | |
| for Forbearance Pursuant to 47 U.S.C. § |) | WC Docket No. 06-172 |
| 160(c) in the Boston, New York, Philadelphia, |) | |
| Pittsburgh, Providence, and Virginia Beach |) | |
| Metropolitan Statistical Areas |) | |

DECLARATION OF JOSEPH GILLAN

I. Introduction and Qualifications

1. My name is Joseph Gillan. My business address is PO Box 7498, Daytona Beach, Florida, 32116. I am a consulting economist with a practice that specializes in the telecommunications industry.

2. I am a graduate of the University of Wyoming where I received B.A. and M.A. degrees in economics. My graduate program focused on the analysis of economic issues involving public utilities, including telecommunications.

3. In 1980 I was recruited to join the Policy Analysis and Research Division at the Illinois Commerce Commission, the state agency responsible for regulating public utilities in Illinois. From 1980 to 1985, I was responsible for the policy analysis of issues created by the emergence of competition in regulated markets, in particular the telecommunications industry.

4. While on the staff of the Illinois Commission, I was named to the Staff Subcommittee for the Communications Committee of the National Association of Regulatory Utility Commissioners (NARUC). I was also appointed to the Research Advisory Council overseeing the National Regulatory Research Institute, NARUC's research arm located at Ohio State University.

5. In 1985, I left the Commission to join U.S. Switch, a venture firm organized to develop interexchange access networks in partnership with independent local telephone companies. At the end of 1986, I resigned from my position as Vice President, Marketing and Strategic Planning to begin a consulting practice.

6. Over the past twenty years, I have provided testimony before more than 35 state commissions, seven state legislatures, the Commerce Committee of the United States Senate, and the Federal/State Joint Board on Separations Reform. I have also been called to provide expert testimony before federal and state civil courts by clients as diverse as the trustees of a small competitive carrier in the Southeast to Qwest Communications, a progeny of the AT&T divestiture. In addition, I have filed expert analysis with the Finance Ministry of the Cayman Islands and before the Canadian Radio-Telecommunications Commission.

7. I currently serve on the Advisory Council to New Mexico State University's Center for Public Utilities (since 1985) and I am an instructor in their "Principles of Regulation" program taught twice annually in Albuquerque. I also lecture at Michigan State University's Regulatory Studies Program, I have lectured at the School of Laws at the University of London (England) on telecommunications policy and cost analysis in

the United States, and have been invited to lecture at Northwestern University's School of Law.¹

II. Purpose of Declaration

8. The purpose of my declaration is to address the reliability of the E911 database in measuring local competition, particularly as a measure of the number of switched-based lines served by competitive local exchange carriers (CLECs). Each of Verizon's applications for forbearance relies, to one extent or another, on claims regarding the level and scope of local competition derived from the E911 listings.² Because such listings are used by providers of emergency services, there is a false presumption that the database can be used as a measure of local competition.³

9. The confidential nature of the E911 database makes it difficult to validate whether it accurately measures local competition.⁴ Over the past several years, however, E911-based data has been proffered by Incumbent Local Exchange Carriers (ILECs) in a

¹ A complete summary of my qualifications, listing of testimony and publications is provided as Exhibit JPG-1, attached to this declaration.

² For instance, see *Lew/Verses/Garzillo Decl. – Boston MSA*, at 24; *Lew/Verses/Garzillo Decl. – New York MSA*, at 25; *Lew/Verses/Garzillo Decl. – Philadelphia MSA*, at 24; *Lew/Verses/Garzillo Decl. – Pittsburgh MSA*, at 21; *Lew/Verses/Garzillo Decl. – Providence MSA*, at 21-22; *Lew/Verses/Garzillo Decl. – Virginia Beach MSA*, at 20-21.

³ Although considerable effort is devoted by all carriers to ensure that the E911 database correctly dispatches emergency service personnel to a correct physical address, that care does not mean that the database correctly measures lines for the purpose of a competitive analysis.

⁴ Although E911 listings are intended to remain confidential and be used exclusively for emergency purposes, some incumbent local exchange carriers (which frequently manage the databases) routinely provide themselves extracts as a means to gather competitive intelligence. For example, SBC Oklahoma recently responded to discovery acknowledging that: "SBC's regulatory organization evaluates aggregate CLEC information that is extracted once a month to derive quarterly estimates of total CLEC access lines within the SBC service area." See SBC Oklahoma Response to RFI 2.23(b), Oklahoma Corporation Commission Docket 200500042, May 13, 2005.

variety of state proceedings where discovery procedures permitted the comparison of these E911-based claims to actual line counts provided by the CLECs themselves. Although the precise comparisons are protected through confidentiality agreements, the specific conclusions in each of these proceedings are not. In the declaration below, I summarize the results of these validation efforts that demonstrated, without exception, that the E911 database systematically overstates the number of lines served by competitors and, as such, it is not a reliable measure of local competition.

III. Summary of E911 Validation Analyses from State Proceedings

10. As indicated, over the past several years a number of incumbent local exchange carriers have sought reduced regulation based, in part, on claims concerning the level of competition measured by information drawn from the E911 database. Because state-level proceedings typically permit discovery, it has been possible to mount an evidentiary challenge to the incumbent's claims. Although the detailed analyses of the E911 database as a measure of competition are confidential, summary information is publicly available.⁵

11. The most extensive comparison of E911-based competitive claims to actual carrier-provided line counts that found its way to the public record was conducted in an

⁵ There are various reasons why the E911 database would not accurately measure competitive lines. One example is an arrangement where a CLEC provides a high-speed digital facility (DS1) to a landlord or other intermediary (such as a university) that serves multiple end-user lines or customers behind a PBX. The service provided by the CLEC would be equivalent to 24 lines, while the E911 database might be populated with data on each individual tenant (which, depending on the level of expected simultaneous calls from the building, could be several multiples of 24). Although the *fact* that the E911 database overstates CLEC lines is well documented, there has not been a comprehensive audit to determine each and every *cause*.

investigation in Oklahoma.⁶ In that investigation (as in the other analyses summarized below), it was possible compare the level of competition being attributed to Cox Communications and Logix to actual line counts provided by the carriers. There, the conclusion reached was that “the E911 database systematically inflates CLEC lines, particularly in the business market where the average (of Cox and Logix) error (*i.e.*, inflation) rate is between 70% and 115%.⁷ Although the precise *level* of the inflated line count cannot be discerned from the public Oklahoma testimony, the *percentage* error as a measure of business lines (70% to 115%), as well as the broader conclusion that “[t]he E911 database is simply and unambiguously not a reliable measure of local competition,” is known.⁸

12. The conclusions reached in Oklahoma are not unique to that State or to the claims of that ILEC. Similar analyses were conducted in Kansas, Wisconsin and Illinois. In Kansas, the investigation concluded:

Based on a comparison of business lines to E911 listings for Cox, it appears that the same reasons that the E911 database systematically inflates estimates of CLEC lines elsewhere apply with equal (or greater) force here.... the E911 database inflates the number of business lines actually served by Cox by 222%.⁹

⁶ See Supplemental Testimony of Joseph Gillan of behalf of Cox Communications, Oklahoma Corporation Commission Docket 200500042, May 23, 2005. Attached as Exhibit JPG-2.

⁷ *Id.*, at 6.

⁸ *Id.*, at 2 (emphasis in original).

⁹ Testimony of Joseph Gillan on behalf of Cox Communications and WorldNet, Kansas Corporation Commission Docket No. 05-SWBT-907-PDR, May 27, 2005, at 18-19 (Footnotes omitted). Attached as Exhibit JPG-3.

13. Not only did the E911 database systematically inflate the number of lines actually served by Cox in Kansas overall, but the analysis further revealed that the overstatement applied in each of the markets served by Cox (*i.e.*, Topeka and Wichita):¹⁰

Table 4: Comparing Actual Business Lines to E911 Listings

| | Actual Lines | E911 Listings | Percentage Error |
|---------|-------------------------|--------------------------|-------------------------|
| Topeka | | | 146% |
| Wichita | | | 225% |
| Total | | | 222% |

14. The conclusion that the E911 database overstates CLEC lines was also validated by a proceeding in Wisconsin. In that state, SBC Wisconsin relied upon the E911 database to attribute a level of lines to two carriers (TDS Metrocom and McLeodUSA) that significantly exceeded the number of UNE loops leased to those carriers. SBC Wisconsin attempted to explain the difference between the number of lines in the E911 database and the number of loops leased by the carriers by claiming that “other facilities” (facilities other than UNE loops leased from SBC) were being used to provide service to residential customers. These carriers explained in discovery, however, that neither served *any* residential customers over facilities other than loops leased from SBC. Consequently, the evidence showed that the E911 database overstated the number of lines actually served by these carriers.¹¹

¹⁰ *Ibid.* at 19.

¹¹ Direct Testimony of Joseph Gillan on behalf of the Citizens Utility Board, April 19, 2005, Wisconsin Public Service Commission Docket No. 6720-TI-196, at 22-24. Attached as Exhibit JPG-4.

15. A similar proceeding in Illinois provided further validation that the E911 database is not a reliable measure of local competition. In Illinois, 44% of the non-cable residential listings¹² claimed by Illinois Bell as evidence of residential lines served by competitors were attributed to either backbone network providers (such as Global Crossings and Level 3), or carriers that only provide business services (such as Focal Communications and XO).¹³ Similarly, the Illinois proceeding revealed that the residential line counts attributed to TDS Metrocom and McLeodUSA (which at least do provide residential service), were based on the implied claim that these carriers *self-provided* 15% of the loops used to serve residential customers, a configuration that the carriers do not use.

16. Finally, Verizon recently requested reduced regulation in New York based, in part, on an E911-derived estimate of business lines served by CLECs in that State. Significantly, Verizon's E911-based claim significantly exceeds the total number of facility-based business lines reported to the FCC for the entire State.¹⁴ Indeed, assuming that *none* of the other ILECs in New York are leasing a switch-based wholesale service to competitors (an absurdly conservative assumption), "the number of business lines served

¹² Because the Illinois proceeding was limited to residential service, the analysis in that State only evaluated whether E911 listings provided a reliable measure of residential competition.

¹³ Gillan Direct Testimony, Data Net Systems Exhibit JPG 1.0, Illinois Commerce Commission Docket No. 06-0027, March 6, 2006, at 26. Attached as Exhibit JPG-5.

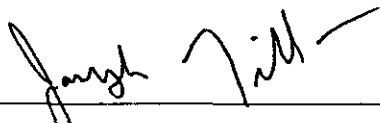
¹⁴ Source: Local Telephone Competition: Status as of December 31, 2005, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, July 2006 ("FCC December Local Competition Report"). The number of CLEC Business Lines is calculated by multiplying the number of total lines being served by CLECs in New York (Table 9) by (1- the % of residential lines served by CLECs reported in Table 12).

by CLEC facilities in New York claimed in the *Verizon Report* (based on its “E911 methodology”) is more than 50% larger than the FCC reports.”¹⁵

IV. Conclusion

17. Verizon’s forbearance requests rely extensively on claims regarding local competition based on the E911 database. As shown above, however, in each and every instance where the E911 database has been made available for validation, the database has been shown to inflate the level of competition. The E911 database should not be relied upon to any extent to determine the level of competition in any market.

Executed on March 2, 2007.



Joseph Gillan

¹⁵ Gillan Report, New York Public Service Commission Case No. 06-C-0897, Submitted with Joint Comments of COMPTTEL, Cordia Communications, Covad Communications, InfoHighway Communications, Smart Choice Communications, Transbeam, and XO Communications, September 25, 2006, at 6 (emphasis in original). The maximum number of business lines served by CLEC-switching is calculated by subtracting (1) the number of business lines that Verizon reports being served using Resale and Wholesale Local Advantage from (2) the total number of CLEC business lines reported by the FCC. To the extent that some of the CLEC business lines (as counted by the FCC) are relying on switching provided by ILECs other than Verizon in New York, the calculation incorrectly counts the lines as being provisioned on a CLEC switch. As a result, the calculation overestimates the number of lines served by CLEC switching, and the estimate provided by Verizon conflicts with the FCC Local Competition Report by an even greater margin.

EXHIBIT 2

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

| | | |
|------------------------------------------------|---|-------------------------------------|
| In the Matter of |) | |
| |) | |
| Petitions of the Verizon Telephone Companies |) | |
| for Forbearance, Pursuant to 47 U.S.C. § |) | WC Docket No. 06-172 (consolidated) |
| 160(c), in the Boston, New York, Philadelphia, |) | |
| Pittsburgh, Providence and Virginia Beach |) | |
| Metropolitan Statistical Areas |) | |

DECLARATION

DECLARATION OF LISA R. YOUNGERS:

I, Lisa R. Youngers, hereby declare under penalty of perjury that the following is true and correct:

1. My name is Lisa R. Youngers. I currently am employed in the position of Director, Federal Regulatory Affairs, for XO Communications, LLC ("XO"). My business address is 11111 Sunset Hills Road, Reston, Virginia 20190. My primary job responsibilities for XO include managing all policy matters that affect XO before the Federal Communications Commission ("FCC" or "Commission").

2. This Declaration is made on behalf of XO, and in support of the initial comments filed jointly by XO, Broadview Networks, Inc., Covad Communications Group and NuVox Communications in the above-captioned proceeding (the "Joint Comments"), urging the Commission to summarily dismiss or, at a minimum, deny the Verizon Petitions.¹

3. XO is a competitive local exchange carrier ("CLEC"), headquartered in Reston, Virginia. Through its operating subsidiaries, XO currently offers a full suite of local and

¹ See *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance, Pursuant to 47 U.S.C. § 160(c), in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, CC Docket No. 06-172 (filed Sept. 6, 2006).

long distance voice, Dedicated Internet Access, Private Data Networking, Hosting and integrated telecommunications services to small businesses, enterprise and carrier customers throughout the service territory of Verizon, including within the Boston, New York, Philadelphia and Pittsburgh MSAs.² XO delivers services, in part, over its own network facilities, and also employs facilities leased or purchased from other carriers, including Verizon.

4. The purpose of this Declaration is to demonstrate that the Verizon Petitions substantially overstate the progress of local competition within four of the six MSAs for which Verizon requests forbearance relief, under Section 10. Specifically, this Declaration reveals that the E911 data presented in the Verizon Petitions does not accurately reflect the level and scope of XO's operations within the Boston, New York, Philadelphia, or Pittsburgh MSAs. The CLEC business line counts for XO set forth in the Verizon Petitions significantly exceed the actual business line counts recorded by XO's internal ALI databases.

The E911 Database is Not a Reliable Measure of Local Competition

5. The Verizon Petitions rely to a large extent on switched-access line counts that Verizon retrieved from E911 databases. As a general matter, E911 data, such as that used to support the Verizon Petitions, does not accurately reflect the level and scope of CLEC operations within local markets, and therefore does not accurately measure local competition. In state proceedings where real time switched access line counts were made available by CLECs, such E911 data proved to substantially inflate the actual number of switched access lines served by CLECs within certain local markets.³

² XO currently provides service to a small number of customers within the Providence, Rhode Island MSA, that physically are located within Massachusetts, and XO does not actively market its services within that MSA. XO currently does not serve customers within the Virginia Beach, Virginia MSA.

³ See Declaration of Joseph Gillan, appended to the Joint Comments as Exhibit 1 (Mar. 5, 2007) at 4-7.

7. Before the Commission, Verizon already conceded that E911 data does not correlate to the actual provision of local service by CLECs.⁴ In the same proceeding, a database administrator independently confirmed that E911 data cannot be used to accurately measure local competition, in particular, within the market for business services.⁵

The Verizon Petitions Inflate XO's Business Line Counts Within Four Markets

8. The CLEC business line counts for XO set forth in the Verizon Petitions significantly exceed the actual business line counts recorded by XO's internal databases, for the Boston, New York, Philadelphia and Pittsburgh MSAs.

9. For the Boston MSA, the Verizon Petitions state that XO served [REDACTED: HIGHLY CONFIDENTIAL] business lines as of the end of December 2005. The information retrieved from XO's ALI database for that market indicates that XO currently serves [REDACTED: HIGHLY CONFIDENTIAL] business lines within the Boston MSA. Therefore, Verizon's business line count for XO, for the Boston MSA, is overstated by [REDACTED: HIGHLY CONFIDENTIAL] business lines, or [REDACTED: HIGHLY CONFIDENTIAL].

10. For the New York MSA, the Verizon Petitions state that XO served [REDACTED: HIGHLY CONFIDENTIAL] business lines as of the end of December 2005. The information retrieved from XO's ALI database for that market indicates that XO currently serves [REDACTED: HIGHLY CONFIDENTIAL] business lines within the New York MSA.

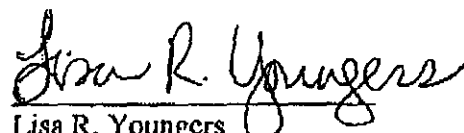
⁴ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Wireless Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Joint Petition for Stay Pending Judicial Review of BellSouth Telecommunications, Inc. Qwest Communications International Inc., SBC Communications Inc., United States Telecom Association and the Verizon Telephone Companies (filed Sept. 4, 2003) 20.

⁵ *Ex Parte* Letter from Martha Jenkins, Senior Director, Intrado Inc. to William F. Caton, Secretary, Federal Communications Commission (Apr. 19, 2002), at 1-2.

Therefore, Verizon's estimated business line count for XO, for the New York MSA, is overstated by [REDACTED: HIGHLY CONFIDENTIAL] business lines, or [REDACTED: HIGHLY CONFIDENTIAL].

11. For the Philadelphia and Pittsburgh MSAs, the Verizon Petitions state that XO served [REDACTED: HIGHLY CONFIDENTIAL] business lines as of the end of December 2005. The information retrieved from XO's ALI database for those markets indicates that XO currently serves [REDACTED: HIGHLY CONFIDENTIAL] business lines within the Philadelphia and Pittsburgh MSAs.⁶ Therefore, Verizon's estimated business line count for XO, for the Philadelphia and Pittsburgh MSAs, is overstated by [REDACTED: HIGHLY CONFIDENTIAL] business lines, or [REDACTED: HIGHLY CONFIDENTIAL].

12. This concludes my Declaration.


Lisa R. Youngers
XO Communications, LLC

Dated: March 5, 2007

⁶ XO was unable to separately quantify business lines in the Philadelphia and Pittsburgh MSAs.

EXHIBIT 3



Verizon Partner Solutions
600 Hidden Ridge
HQEWMNOTICES
P.O. Box 152092
Irving, TX 75038

February 12, 2007

Subject:

Dear

On January 15, 2007, Verizon Communications agreed with FairPoint Communications to spin off local exchange and certain other businesses in Maine, New Hampshire, and Vermont, and to merge the spun-off business with FairPoint Communications, Inc. FairPoint, based in Charlotte, North Carolina, is a communications provider with 31 local exchange companies in 18 states.

The transaction includes local exchange service, intraLATA toll service, network access service, and enhanced voice and data services provided by the legal entity Verizon New England Inc. in the states of Maine, New Hampshire, and Vermont. In addition, the transaction also includes long distance voice, private line (where end points are within these states), and Customer Premises Equipment services provided by the legal entity Verizon Select Services Inc. in these three states.

Verizon Partner Solutions and FairPoint wanted to reach out to you to address any concerns you may have about this recent announcement. Keep in mind that the transaction is subject to certain regulatory and other approvals, which will likely take up to a year to complete. Until these approvals are received and the transaction is closed, Verizon Partner Solutions will continue to provide uninterrupted sales support and excellent customer service.

The joint objective of Verizon and FairPoint is to make the transition from Verizon to FairPoint seamless to your organization. To that end, Verizon proposes to assign your agreement(s) to FairPoint effective on the closing date of the transaction. You will be contacted at a later time to discuss assignment of the above identified agreement(s).

251-252 INTERCONNECTION AGREEMENTS

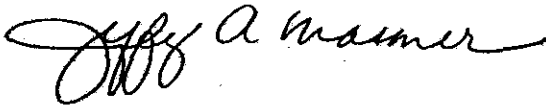
February 12, 2007

Page 2

Both Verizon Partner Solutions and FairPoint Communications look forward to continuing a long-term relationship with your company, and the opportunity to provide wholesale solutions for your business needs. In the coming weeks, your account team or another Verizon representative will reach out to you to discuss the transaction and how it affects you. This will be followed by a contact from the FairPoint team. At this time there is no action required on your part as a result of this recent announcement. However, should any questions arise before we or FairPoint calls you, please do not hesitate to contact your Verizon account team, or the undersigned Verizon representative, directly.

Sincerely,

VERIZON PARTNER SOLUTIONS

A handwritten signature in black ink, appearing to read "Jeff A. Masoner".

Jeffrey A. Masoner

Vice President - Interconnection Services Policy & Planning

FAIRPOINT COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Peter G. Nixon".

Peter G. Nixon

Chief Operating Officer

VIA First Class USPS Mail